

No. 15690

United States
Court of Appeals
for the Ninth Circuit

SUNSET-STERNAU FOOD CO., a corporation,
Appellant,

vs.

AMERICAN ALMOND PRODUCTS, CO., INC.,
a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

JAN 7 1955

PAUL F. GIBSON, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Acknowledgment of Service and Entry of Appearance	8
Affidavit of Norman A. Eisner in Support of Motion for Production of Documents.....	16
Approval of Findings of Fact, Conclusions of Law and Judgment as to Form.....	38
Answer to Complaint.....	8
Appeal:	
Certificate of Clerk to Transcript of Record on	60
Notice of	55
Statement of Points on.....	62
Supplemental Certificate of Clerk on.....	65
Undertaking on	58
Certificate of Clerk to Transcript of Record...	60
Certificate of Clerk to Supplemental Record...	65
Complaint	6
Docket Entries, Excerpts.....	3

ii.

Findings of Fact and Conclusions of Law.....	38
Interrogatories and Defendant's Answers Thereto	20
Judgment	44
Motion for New Trial.....	45
Defendant's Proposed Findings of Fact and Conclusions of Law.....	48
Motion of Plaintiff for Production and Inspec- tion of Documents.....	10
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	55
Order Denying Motion for New Trial, etc.....	54
Order Extending Stay of Execution Dated July 26, 1957	57
Order Extending Time to Docket Record and Staying Execution Dated July 16, 1957.....	56
Order Staying Execution Upon Judgment:	
Dated May 13, 1957.....	52
Dated June 5, 1957.....	55
Dated June 26, 1957.....	56
Statement of Points to Be Relied Upon.....	62
Stipulation re Arguments Made on May 28, 1957	53

Transcript of Proceedings and Testimony..... 66

Closing Argument by Mr. Eisner...335, 389, 441

Closing Argument by Mr. O'Connor.....359, 416

Witnesses for Plaintiff:

Ehrenfeld, Ferdenand

—direct 254

—cross 266

Engell, Raymond L.

—direct 227

—cross 243

—redirect251, 252

—recross 251

Kaplan, Jack M.

—direct144, 169

—cross197, 219

—recalled, cross275, 284

—redirect 294

—recross 300

Sternau, Sydney (Deposition)

—direct 70

Wright, George

—direct 136

—cross 138

Witnesses for Defendant:

O'Connor, Raymond J.

—direct 328

—cross 332

Transcript of Proceedings—(Continued):

Witnesses for Defendant—(Continued):

Sternau, Sidney

—direct	302
—cross	313
—redirect	326

Undertaking on Appeal and to Stay Execution 58

NAMES AND ADDRESSES OF COUNSEL

RAYMOND J. O'CONNOR,

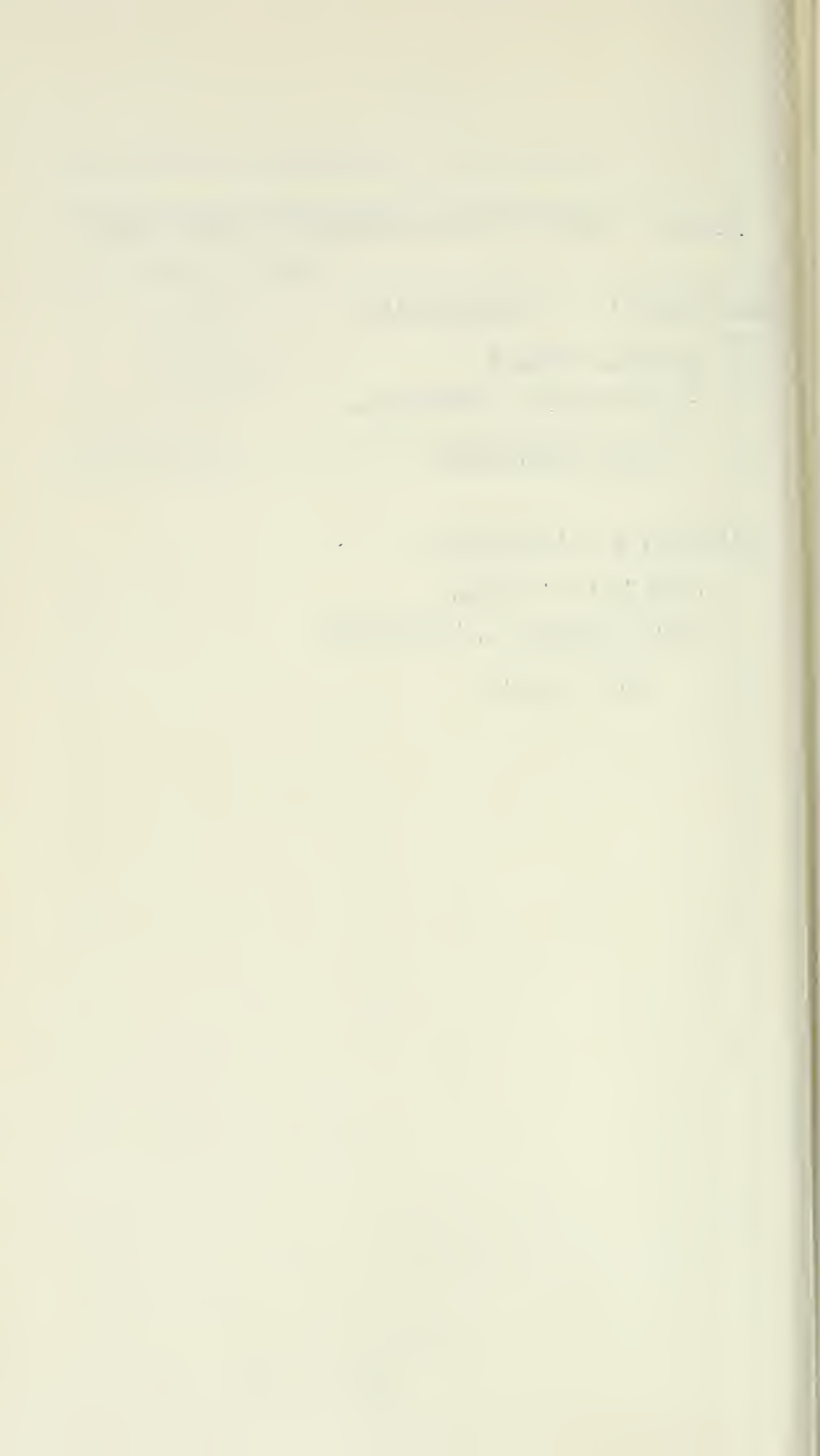
185 Post Street,
San Francisco, California,

For Appellant.

EISNER & TITCHELL,

1074 Mills Building,
San Francisco 4, California,

For Appellee.



In the United States District Court, Northern
District of California, Southern Division

No. 35103-Civil

AMERICAN ALMOND PRODUCTS CO., INC.,
a corporation, Plaintiff,

vs.

SUNSET-STERNAU FOOD CO., a corporation,
Defendant.

EXCERPT FROM DOCKET ENTRIES

1955

Dec. 2—Filed complaint—issued summons.

21—Filed acknowledgment of service and entry of appearance for defendant.

1956

Jan. 19—Filed answer of defendant.

Aug. 23—Mailed notice dismissal calendar, Aug. 30, 1956.

30—Ordered case off dismissal calendar
(Goodman)

* * * * *

Sept. 11—Filed interrogatories by plaintiff to defendant.

* * * * *

Nov. 16—Filed answer of defendant to interrogatories by plaintiff.

* * * * *

1957

Jan. 14—Ordered case for trial Feb. 21, 1957.
(Goodman)

1957

Feb. 21—Ordered case assigned to Judge Roche for trial this date. (Goodman)

21—Court trial. Pre-trial conference held, answer of defendant amended, evidence and exhibits introduced and further trial continued to Feb. 25, 1957 at 10 A.M. (Roche)

25—Further Court trial. Evidence and exhibits introduced and further trial cont'd. to Feb. 26, 1957 at 10 A.M. (Roche)

26—Further Court trial. Evidence and exhibits introduced, arguments heard, memos. ordered filed 5-5-5 days and case cont'd. to March 18, 1957 for further argument and submission. (Roche)

* * * * *

Mar. 18—Further court trial. Arguments heard and case cont'd. to March 25, 1957, for further argument and submission. (Roche)

25—Further Court trial. Arguments heard and case cont'd. to April 8, 1957 for submission. (Roche)

Apr. 8—Ordered, case cont'd. to April 15, 1957 for further trial. (Roche)

12—Filed reporter's transcript of proceedings Feb. 21, 25, 26 and Mar. 25, 1957.

* * * * *

Apr. 15—Ordered after hearing, case submitted and judgment ordered for plaintiff. Counsel to prepare findings, conclusions & judgment. (Roche)

* * * * *

1957

Apr. 23—Filed approval of findings of fact and conclusions of law and judgment as to form, by defendant.

May 2—Filed findings & conclusions. (Roche)

May 2—Entered judgment—filed May 2, 1957—
for plaintiff vs. Sunset-Sternau Food Co.
in sum \$37,500.00 and costs. (Roche)

2—Mailed notices.

* * * * *

13—Filed notice by deft. of motion for new trial, May 27, 1957, with proposed form of findings & conclusions attached.

13—Filed order staying execution until ruling on motion for new trial and 10 days thereafter. (Roche)

* * * * *

28—Hearing on motion for new trial. Arguments heard and motion denied. (Roche)

June 3—Filed stipulations that arguments made May 28, 1957 be considered arguments on both motions.

3—Filed order denying motion for new trial and to vacate judgment. (Roche)

6—Filed order staying execution 10 days from June 5, 1957. (Roche)

6—Filed notice of appeal by deft.

7—Mailed notices.

26—Filed order staying execution 10 days from this date. (Roche)

July 16—Filed order extending time to docket appeal for 50 days from this date and staying execution 10 days. (Roche)

1957

July 26—Filed order staying execution 10 days from this date. (Goodman)

Aug. 12—Filed appeal bond to stay execution in sum of \$42,000.00, “Approved as to form and sufficiency of surety, Aug. 12, 1957, Louis E. Goodman, Judge US District Court.”

[Title of District Court and Cause.]

COMPLAINT FOR DAMAGES FOR
BREACH OF CONTRACT

Plaintiff complains of defendant and alleges:

I.

That plaintiff is a corporation incorporated under the laws of the State of New York; that defendant is a corporation incorporated under the laws of the State of California.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00).

II.

That on or about the 8th day of September, 1955, plaintiff and defendant entered into a contract in writing, whereby defendant agreed to sell to plaintiff and plaintiff agreed to purchase from defendant approximately seventy-five (75) tons of “Regular Apricot Kernels”, 1955 crop, packed in 100-pound net bags, Sunset Brand, at 17½ cents per pound, f.o.b. West Coast dock, terms: less 2 per cent—2 days’ sight draft, shipment from Cali-

fornia, half of quantity about October 31, 1955, balance about November 30, 1955. That in connection with said sale, defendant submitted a sample of apricot kernels, which sample was of good merchantable quality, and was approved by plaintiff. That the term "Regular Apricot Kernels", according to a general and well established custom and usage existing among those engaged in the California apricot kernel trade, means and meant at the time said contract was entered into, that broken kernels in any delivery shall not exceed five per cent (5%) by weight.

III.

That plaintiff has duly performed all terms and conditions upon its part to be performed, and has at all times been ready, able and willing to accept and pay for said merchandise.

IV.

That plaintiff has demanded of defendant delivery of said apricot kernels, but that the defendant has failed, neglected and refused to deliver same or any part thereof.

V.

That plaintiff has suffered damages by reason of the breach and default of defendant in the sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), no part of which has been paid.

Wherefore, plaintiff prays judgment against de-

fendant for the sum of \$37,500.00, interest, and costs of suit.

/s/ By NORMAN A. EISNER,
EISNER & TITCHELL,
Attorneys for Plaintiff.

[Endorsed]: Filed December 2, 1955.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE AND ENTRY OF APPEARANCE

Sunset-Sternau Food Co., a corporation, by and through its counsel, hereby acknowledges service of the Summons and Complaint in the above captioned proceeding and hereby enters its appearance therein.

Dated: December 15th, 1955.

/s/ RAYMOND J. O'CONNOR,
Attorney for Sunset-Sternau Food
Co., a Corporation.

[Endorsed]: Filed December 21, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT SUNSET - STER- NAU FOOD COMPANY, A CORPORATION

Comes Now Defendant Sunset-Sternau Food Company, a corporation, and answering the Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations contained in Paragraph I of the Complaint this answering defendant alleges that it has no information or belief within which to answer the allegations of plaintiff as a corporation incorporated under the laws of the State of New York, and upon that ground denies each and every, all and singular said allegations.

II.

Answering Paragraph II of the Complaint this defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

III.

Answering Paragraphs III, IV and V of said Complaint, this defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part and the whole thereof.

Further Answering the Complaint on File Herein and for a Second, Separate and Affirmative Defense Thereto, This Defendant Alleges as Follows:

IV.

That said Complaint fails to state a claim against this defendant upon which relief can be granted and that said Complaint is based upon a contract required to be in writing as set forth in Section 1724 of the Civil Code of the State of California and Section 1973 of the Code of Civil Procedure

of the State of California, which said sections require that contracts as set forth in said Complaint must be in writing and signed by all parties thereto.

Wherefore, this defendant prays that plaintiff take nothing by reason of its Complaint on file herein and that it be dismissed hence with its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant Sunset-Sternau Food Company, a Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

MOTION OF PLAINTIFF FOR PRODUCTION
OF DOCUMENTS FOR INSPECTION,
COPYING OR PHOTOGRAPHING, PUR-
SUANT TO RULE 34, RULES OF CIVIL
PROCEDURE

The plaintiff, American Almond Products Co., Inc., moves the above entitled Court for an order requiring defendant, Sunset-Sternau Food Company, to produce and to permit plaintiff to inspect and to copy each of the following documents:

1. All correspondence and written communications, including letters and wires, that passed be-

tween defendant and Prince, Keeler & Co. Inc. during the years 1955 and 1956, pertaining to apricot kernels, including but not limited to:

(a) Notification that defendant has apricot kernels that Prince, Keeler & Co. Inc. could offer for sale;

(b) Authorization by defendant to Prince, Keeler & Co. Inc. to offer apricot kernels for sale;

(c) Letters or telegrams pertaining to or accompanying samples of apricot kernels;

(d) Letters or telegrams reporting a sale of apricot kernels by Prince, Keeler & Co. Inc. to plaintiff;

(e) Letters and telegrams pertaining to examination of samples of apricot kernels by plaintiff;

(f) Letters and telegrams referring to a custom of the trade limiting the percentage of broken kernels permissible in a delivery of regular apricot kernels;

(g) Communications enclosing or accompanying forms of contracts prepared by defendant and sent to Prince, Keller & Co. Inc.;

(h) Communications enclosing or accompanying return of said forms of contracts or any thereof from Prince, Keller & Co. Inc. to defendant;

(i) Any reply by letter or telegram by defendant to communications from Prince, Keller & Co. Inc. and in conjunction with which Prince, Keller & Co. Inc. returned contracts to defendant;

(j) Letters or telegrams in which defendant replied to Prince, Keller & Co. Inc. with reference

to the percentage of broken kernels in the samples submitted, or with reference to a trade custom pertaining to the percentage of broken kernels permissible in a delivery of regular apricot kernels;

(k) Letters and telegrams pertaining to non-delivery of apricot kernels by defendant to plaintiff;

(l) Letters and telegrams in which Prince, Keeler & Co. Inc. notified defendant of communications received from plaintiff pertaining to apricot kernels, including demands made by plaintiff for delivery of apricot kernels and/or threatening action in the event of non-delivery;

(m) Letters and telegrams from defendant to Prince, Keeler & Co. Inc. pertaining to delivery and/or non-delivery of apricot kernels by defendant to plaintiff;

(n) Letters and telegrams from defendant having reference to Rudy Bonzi, whether or not identified by name, and difficulties of defendant with Rudy Bonzi with respect to shelling and/or delivery of apricot kernels;

(o) Letters and telegrams seeking a cancellation or release of contract from sale and delivery of apricot kernels by defendant to plaintiff;

(p) Letters and telegrams in which defendant referred to the existence of a contract of purchase and sale of apricot kernels between defendant and plaintiff;

(q) Letters and telegrams in which defendant requested Prince, Keeler & Co. Inc. to communi-

cate with plaintiff pertaining to delivery of apricot kernels;

(r) Letters and telegrams in which defendant promised to cooperate in making delivery to plaintiff of apricot kernels;

(s) Any and all other communications that passed between defendant and Prince, Keller & Co. Inc. and having reference to a contract of sale by defendant and to plaintiff of apricot kernels, and acts done pursuant thereto or in performance thereof.

2. All correspondence and written communications that passed between defendant or the attorney for defendant and Rudy Bonzi during the years 1955 and 1956 and pertaining to apricot kernels including but not limited to the following:

(a) Communications referring to apricot kernels owned by defendant;

(b) Communications referring to apricot kernels owned by Rudy Bonzi;

(c) Communications referring to shelling of apricot kernels by Rudy Bonzi;

(d) Communications referring to difficulties incurred by Rudy Bonzi in shelling of apricot kernels;

(e) Communications referring to inadequacy or deficiency of machinery or equipment of Rudy Bonzi to shell apricot kernels;

(f) Communications referring to samples of apricot kernels supplied by said Rudy Bonzi to defendant;

(g) Communications referring to the percentage of broken kernels in apricot kernels shelled by Rudy Bonzi;

(h) Communications referring to the trade custom limiting percentage of broken kernels in a delivery of regular apricot kernels;

(i) Communications of defendant or the attorney for defendant to Rudy Bonzi demanding delivery of apricot kernels;

(j) Communications from defendant or the attorney for defendant to Rudy Bonzi threatening action against Rudy Bonzi for non-delivery of apricot kernels;

(k) Communications from Rudy Bonzi or from defendant to Rudy Bonzi with reference to obtaining a release or cancellation of contract between defendant and plaintiff for sale and delivery of seventy-five (75) tons of regular apricot kernels;

(l) Communications having reference to the shelling of apricot kernels by California Packing Corporation or someone other than said Bonzi;

(m) Communications having reference to a visit by Jack Kaplan to Mr. Sternau;

(n) Any other communications by letter or wire that passed between defendant and Rudy Bonzi and upon the subject of apricot kernels during the years 1955 and 1956.

3. Sold note or memorandum sent by Prince, Keller & Co. Inc. to defendant covering sale of seventy-five tons of regular apricot kernels by defendant to plaintiff;

4. Contract prepared by defendant based on the sold note or memorandum referred to in the immediately preceding specification.

5. All contracts or agreements between defendant and Rudy Bonzi pertaining to the sale or shelling of apricot kernels whether belonging to defendant or said Bonzi, or pertaining to any joint venture between defendant and said Bonzi in connection with apricot kernels.

This motion includes originals of all documents received by defendant and copies of all documents sent by defendant.

This motion is made pursuant to Rule 34 of the Rules of Civil Procedure and is supported by the affidavit of Norman A. Eisner, an attorney for the plaintiff, and which is filed herewith.

Dated: September 11th, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: Sunset-Sternau Food Company, a corporation, defendant, and to Raymond J. O'Connor, Esquire, its attorney:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above entitled Court, at Room 258, Post Office Building, Seventh and Mission Streets, San Francisco, California on Monday the 17th day of Sep-

tember, 1956, at 9:30 o'clock A.M., or as soon thereafter as counsel can be heard.

Dated: September 11, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

Points and Authorities

Rule 34, Federal Rules of Civil Procedure.

Certificate of Service Attached.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION OF
PLAINTIFF FOR PRODUCTION OF DOC-
UMENTS FOR INSPECTION, COPYING
OR PHOTOGRAPHING, PURSUANT TO
RULE 34, RULES OF CIVIL PROCE-
DURE

State of California

City and County of San Francisco—ss.

Norman A. Eisner, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice as such in the United States District Court for the Northern District of California, Southern Division; that he is one of the attorneys for the plaintiff in the above entitled action and makes this affidavit in support of Motion for pro-

duction of documents made pursuant to Rule 34 of the Rules of Civil Procedure.

That the complaint in said action sets forth a cause of action for breach of contract for the sale by defendant to plaintiff of seventy-five (75) tons of regular apricot kernels, and which contract was entered into on or about September 8, 1955. Non-delivery by defendant is pleaded and damages resulting from such non-delivery are prayed for. Due performance by plaintiff and demand upon defendant for delivery are also alleged.

The answer of defendant puts in issue the existence of a contract and denies generally and specifically all allegations of the complaint. The answer also pleads as an affirmative defense, the Statute of Frauds.

Plaintiff is a New York corporation and has its place of business in New York. Defendant is a California corporation and has its place of business in Modesto. Prince, Keller & Co. Inc. is a corporation engaged in the merchandise brokerage business in the City of New York. That defendant offered apricot kernels to plaintiff through said brokerage concern and that said brokerage concern issued its broker's memoranda consisting of bought and sold notes, which were delivered to plaintiff and defendant respectively. That proof of authority of Prince, Keeler & Co. Inc. to negotiate said sale, ratification and recognition of said sale by defendant, written admissions of said sale, and acts done by defendant pursuant to and in performance of said contract are all relevant and material to the issues and to said affirmative defense. That all

communications that passed between defendant and Prince, Keeler & Co. Inc. bearing upon the subject of apricot kernels preceding and succeeding the issuance of the broker's memoranda hereinbefore referred to and during the years 1955 and 1956 are pertinent, and, according to the belief of affiant, contain evidence and admissions bearing directly upon the issues of this case.

That the complaint alleges a trade custom by which the percentage of broken kernels in any delivery of "regular apricot kernels" which are the subject matter of the contract alleged in this action cannot exceed five per cent (5%) by weight. The answer has put the existence of such custom in issue, and the correspondence between defendant and Prince, Keller & Co. Inc., according to the information and belief of affiant, contains admissions by defendant of the existence of such a custom.

The complaint alleges that samples of apricot kernels were submitted by defendant to plaintiff and that plaintiff approved the quality of the said samples. These allegations are also put in issue by the answer.

Correspondence between defendant and Prince, Keeler & Co. Inc., according to affiant's information and belief will have direct bearing on the matter of said samples and their approval as to quality by plaintiff.

That according to the information and belief of affiant, formal contracts covering the said sale to plaintiff were prepared by defendant and forwarded to Prince, Keeler & Co. Inc.; that all cor-

respondence bearing upon said contracts and what was done with them is relevant and material.

That according to the information and belief of affiant, defendant had an agreement or arrangement of some character, whether as joint venture, partners, or otherwise, with one Rudy Bonzi, whereby defendant depended upon said Rudy Bonzi for the supplying of said apricot kernels or portions thereof. That defendant has made the alleged failure of said Bonzi to comply with his portion of the agreement an excuse for non-delivery to plaintiff.

That all documents and communications that passed between said Bonzi and defendant pertaining to apricot kernels at or about the time of and following this transaction, as well as all demands upon Bonzi made by defendant, will, according to the information and belief of affiant, contain statements and disclose circumstances relevant and material to the issues in this case and contain admissions by the defendant of the existence of the contract sued upon, the existence of the custom of the trade alleged, the default of defendant in delivery, the increase in market value of the apricot kernels and the resulting damages suffered by plaintiff.

That all communications that passed between plaintiff and defendant pertaining to said transaction will be pertinent to the allegations of the complaint and all of which allegations are put in issue by the answer.

That all of said documents, originals if received

by defendant, and copies if sent by defendant, are in the possession and under the control of defendant.

Dated: September 11, 1956.

/s/ NORMAN A. EISNER.

Subscribed and sworn to before me this 11th day of September, 1956.

[Seal] /s/ LORRAINE PACKARD,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires December 30, 1956.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

INTERROGATORIES AND ANSWERS THERE TO

To Raymond J. O'Connor, Esquire, Attorney for
Defendant:

Plaintiff requests that the defendant, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Over what period of time has defendant done business with Prince, Keeler & Co. Inc.?

Interrogatories propounded by plaintiff under Rule 33 of the Federal Rules of Civil Procedure on September 11, 1956, are hereby answered as follows:

1. Approximately five years.

2. In 1955, did defendant notify Prince, Keeler & Co. Inc. that it could offer for sale on behalf of defendant regular apricot kernels?

2. Yes.

3. If there was such notification, when was it given?

If oral, state when and by whom the notification was given and the substance of what was said.

If in writing, what are the dates of the writings and by whom were they signed.

3. Approximately July 15, 1955, orally, by S. Sternau, that seventy-five tons of apricot kernels would be available for sale.

4. Were there any written communications by letter or telegram that passed between defendant and Prince, Keller & Co. Inc. in the year 1955, pertaining to the sale by Prince, Keeler & Co. Inc. of regular apricot kernels on behalf of defendant?

4. Yes.

5. If there were any such written communications, what are the dates of same and by whom were they signed?

5. All correspondence on subject submitted to plaintiff.

6. When was defendant first notified by Prince, Keeler & Co. Inc. of a sale to plaintiff on behalf of defendant of regular apricot kernels?

6. Defendant notified of offer to purchase by telegram 8-31-55.

7. Was such notification written or oral?

7. By telegram, 8-31-55.

8. If in writing, what was the date of the writing and by whom was it signed?

8. Letter confirming offer to purchase sent to defendant by Prince, Keeler Co. Inc., signed by Wm. Berke, dated 9-1-55.

9. Did defendant receive a Sold Note or a memorandum from Prince, Keeler & Co. Inc. covering the sale of regular apricot kernels to plaintiff, and if so, when was it received?

9. Yes, received approximately 9-2-55, dated 9-1-55; "Sold Note" never recognized by defendant in dealings with Prince, Keeler Co. Inc. at any time, treated as offer only, subject to signing written contract of defendant.

10. Did any written communication accompany said Sold Note, and if so, what was the date of it and by whom was it signed?

10. Yes, 9-1-55, signed Wm. Berke.

11. Did defendant acknowledge receipt of said Sold Note?

11. No.

12. If defendant did acknowledge receipt in writing, please give the date of the writing and by whom it was signed.

12. ———.

13. Did defendant send samples of apricot kernels to Price, Keeler & Co. Inc., and if so, when were they sent?

13. Yes, 8-31-55.

14. Were there any written communications that passed between defendant and Prince, Keeler & Co. Inc. pertaining to said samples or the submission of same to plaintiff?

14. Yes.

15. If there were any such communications, please give the dates of same and by whom they were signed.

15. Telegram, 8-31-55, by defendant.

16. Did defendant receive any written communications from Prince, Keeler & Co. Inc. following the submission of said samples to plaintiff pertaining to the findings of plaintiff with respect to said samples?

16. Yes.

17. If defendant did receive any such communications please give the dates of same and by whom they were signed.

17. 9-8-55, letter, signed Frank L. Sullivan.

18. Did defendant send any written communications to Prince, Keeler & Co. Inc. in response to notifications by Prince, Keeler & Co. Inc. of the results of plaintiff's examination of said samples?

18. Yes.

19. If there were any such written communications, please give the dates of same and by whom they were signed.

19. Letter dated 9-21-55, signed S. M. Sternau.

20. Did defendant prepare a written contract covering the sale of regular apricot kernels to plaintiff, and if so when did it do so?

20. Yes, 9-6-55.

21. Did defendant send the contract so prepared to Prince, Keeler & Co. Inc.?

21. Yes.

22. Did defendant write a letter to Prince, Keeler & Co. Inc. with which said contracts were forwarded?

22. No.

23. If defendant did write such a letter accompanying said contracts, please give the date of same and by whom was it signed.

23. ———.

24. Did defendant receive any written communications from Prince, Keeler & Co. Inc. with respect to said contracts?

24. Yes.

25. If the answer is "Yes" to the last interrogatory, please give the dates of the communications and by whom they were signed.

25. Yes, letter dated 9-8-55, signed by Frank L. Sullivan.

26. Did Prince, Keeler & Co. Inc. return said contracts or any thereof to defendant?

26. Yes.

27. If said contracts or any thereof were returned to defendant, was any letter at the same time written to defendant by Prince, Keeler & Co. Inc.?

27. Yes.

28. If any letter was written and with which said contracts or any thereof were returned to defendant, please give the dates of same and by whom signed.

28. Letter dated 9-8-55, signed by Frank L. Sullivan.

29. Did defendant receive any letter or letters from Prince, Keeler & Co. Inc. pertaining to a trade custom limiting the quantity of broken kernels in any delivery of regular apricot kernels?

29. Yes.

30. If any such letters were received, as referred to in the preceding interrogatory, please give the dates of same and by whom they were signed.

30. Letter, dated 9-8-55, signed by Frank L. Sullivan.

31. Did defendant reply to any communications received from Prince, Keeler & Co. Inc. and with

which communications said contracts were returned to defendant?

31. Yes.

32. If the answer to the preceding interrogatory is "Yes", please give the dates of same and by whom signed.

32. Letter, dated 9-21-55, signed by S. M. Sternau.

33. What, if anything, did defendant do with respect to the contracts after the return thereof by Prince, Keeler & Co. Inc.?

33. Refused to send further contract pending clearance of differences between offer and ability to comply with conditions of offer.

34. Who is Rudy Bonzi?

34. Resident of Modesto, California.

35. Did defendant, in 1955, have any arrangement or transaction with Rudy Bonzi pertaining to apricot kernels?

35. Yes.

36. If the answer to the preceding interrogatory is "Yes", please state what the arrangement or transaction was.

36. Bonzi agreed, orally, to supply seventy-five tons apricot kernels to defendant for resale by defendant.

37. Was there any written agreement between

defendant and Rudy Bonzi pertaining to apricot kernels?

37. No.

38. If the answer to the preceding interrogatory is "Yes", please give the dates of the agreements and by whom signed.

38. ———.

39. Where and from whom did defendant receive the samples of apricot kernels forwarded to Prince, Keeler & Co. Inc.?

39. Rudy Bonzi.

40. Who shelled the apricot kernels, samples of which were forwarded to Prince, Keeler & Co., Inc.?

40. Continental Nut Company, Chico, California.

41. Did defendant, in or about the month of September, 1955, have any communications with Rudy Bonzi pertaining to the shelling of apricot kernels?

41. Yes.

42. If the answer to the preceding interrogatory is "Yes", and the communications were oral, please state the substance of the communications, when and where made and to whom, and persons present, and if in writing, please give the dates and by whom signed.

42. Oral, Bonzi stated to defendant, to S. M. Sternau, L. Hanshaw and S. Tarrico, he was now

unable to shell apricot kernels himself but was endeavoring to find and would find someone who would shell them; conversations at various times during month, dates unknown.

43. To your knowledge did Rudy Bonzi have plant difficulty in the shelling of the apricot kernels?

43. Yes.

44. Did Rudy Bonzi notify defendant that he had plant difficulty in shelling apricot kernels, and if so, when, where, who were present and what was said?

44. Yes—August and September, 1955, at Modesto; Bonzi present, Hanshaw, S. M. Sternau and Stephen Tarrico, dates unknown. Bonzi still claimed he could set up his own plant to do shelling but in any event would be able to get them shelled.

45. Did defendant receive any written communications from Rudy Bonzi pertaining to said difficulty of Rudy Bonzi in shelling apricot kernels?

45. No.

46. If defendant did receive any such written communications, as referred to in the preceding interrogatory, please give the dates and by whom signed.

46. ———.

47. Did defendant write any letter or letters to

Rudy Bonzi pertaining to the shelling of apricot kernels or the reduction of broken kernels in the shelling process?

47. No.

48. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

48. _____.

49. Did Rudy Bonzi ask defendant to endeavor to have him relieved of the obligation to supply apricot kernels for delivery to plaintiff?

49. No.

50. If the answer to the preceding interrogatory is "Yes", please state whether the request was written or oral, and if oral state when, by whom made, persons present, and what was said.

50. _____.

51. If any such request was in writing, please give the date and by whom signed.

51. _____.

52. Did defendant on or about September 21, 1955, write a letter to Prince, Keeler & Co. Inc. pertaining to the obtaining by Prince, Keeler & Co. Inc. of a cancellation or termination of the contract for delivery of apricot kernels to plaintiff?

52. Defendant wrote Prince, Keeler Co. Inc. 9-21-55 advising it could not guarantee five per cent pieces, apricot kernels, and that the packer

(Bonzi) would like to be relieved of any obligation, even though oral and not in writing to defendant or to plaintiff.

53. If the answer to the preceding interrogatory is "Yes", please give the date and by whom signed.

53. Letter, 9-21-55, signed S. M. Sternau.

54. Did Mr. S. M. Sternau have any personal conversations with Mr. Jack Kaplan in Modesto in the month of September, 1955?

54. Yes.

55. If the answer to the preceding interrogatory is "Yes", please state when and where such conversations were held and the persons present.

55. Held at law office of Zeff, Halley & Price, Modesto; present: Jack Kaplan, Norman Eisner, L. Hanshaw, S. M. Sternau, E. Dean Price, attorney for Rudy Bonzi, and Rudy Bonzi.

56. Please state what was said at these conversations as nearly and fully as you can recollect.

56. Kaplan advised that if Bonzi unable to shell that California Packing Corporation would do the shelling—Bonzi stated he would think it over—Kaplan stated market price per pound 45c—Bonzi said it was approximately 30c per pound; on the same date later, in the office of defendant, Bonzi, Kaplan, Tarrico and Sternau present: Kaplan offered to pay more money for shelled kernels than he originally offered; defendant offered to throw its sixty wet tons into the deal and waive broker-

age fee—if Bonzi would make delivery—Bonzi left stating he would think it over.

57. Following conversations between Mr. Sternau and Mr. Kaplan, did defendant receive any written communications from Prince, Keeler & Co. Inc. pertaining to the conversations that had taken place between Mr. Sternau and Mr. Kaplan?

57. Yes.

58. If the answer to the preceding interrogatory is “Yes”, please give the dates and by whom signed.

58. 9-28-55, signed Alex Astrack.

59. Did defendant reply to Prince, Keeler & Co. Inc. in response to any such communications from Prince, Keeler & Co. Inc. and which referred to conversations that had taken place between Mr. Sternau and Mr. Kaplan?

59. Yes.

60. If the answer to the preceding interrogatory is “Yes”, please give the dates and by whom signed.

60. Oral — by telephone, S. M. Sternau, early October, 1955.

61. At or about the time of the conversations between Mr. Sternau and Mr. Kaplan, did Mr. Kaplan arrange to have California Packing Corporation agree to shell the apricot kernels to be delivered to plaintiff?

61. No such arrangement made by Kaplan with

Sternau—such arrangement, if any, made between Kaplan and Bonzi.

62. Did defendant, after the conversations between Mr. Sternau and Mr. Kaplan, have any communications, written or oral, with California Packing Corporation or any officer or employee thereof, pertaining to the shelling of apricot kernels?

62. No.

63. If the answer to the preceding interrogatory is "Yes", please state the substance of any conversation, giving the time, place and persons present, and if there were any written communications, please give the dates and by whom signed.

63. ———.

64. Did defendant receive any letters or telegrams from Prince, Keeler & Co. Inc. pertaining to non-delivery by defendant of the apricot kernels to plaintiff?

64. Yes.

65. If the answer to the preceding interrogatory is "Yes", please give the dates of the communications and by whom signed.

65. Telegram, 10-21-55, by Prince, Keeler & Co. Inc.

66. Did the defendant receive any telephone communications from Prince, Keeler & Co. Inc. pertaining to non-delivery by defendant of said apricot kernels to plaintiff?

66. Do not recall at this time.

67. If the answer to the preceding interrogatory is "Yes", please state the time, the persons speaking, and the substance of said telephone conversations.

67. ———.

68. Did defendant write any letters or send any telegrams to Prince, Keeler & Co. Inc. pertaining to the delivery or non-delivery by defendant of apricot kernels to plaintiff?

68. Yes.

69. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

69. Letter, 10-31-55, signed S. M. Sternau.

70. Did defendant or its attorney make any demands upon Rudy Bonzi for the delivery of apricot kernels intended for delivery to plaintiff?

70. Yes.

71. If the answer to the preceding interrogatory is "Yes", please state fully when the demands were made, by whom, the persons present and the substance of what was said.

71. Orally, many times, by telephone and in person, with L. Hanshaw and S. Tarrico, dates unknown, probably during September and October, 1955.

72. If any demands were in writing, please give the dates and by whom signed.

72. Letter, 10-31-55, signed, Raymond J. O'Connor; letter, 11-3-55, signed, Raymond J. O'Connor.

73. Were any communications received by defendant from Rudy Bonzi or any attorney for Rudy Bonzi in response to any such demands by defendant?

73. Yes.

74. If any communications were received and if they were oral, please state when, where, the persons present, and the substance of what was said.

74. ———.

75. If any such communications were in writing, please give dates and by whom signed.

75. Letter, 11-16-56, signed, E. Dean Price, attorney for Bonzi.

76. Did defendant receive any communications in writing directly from plaintiff pertaining to or demanding delivery of apricot kernels?

76. Yes.

77. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

77. Letter, 10-25-55, signed, Jack M. Kaplan.

78. Did defendant reply to any such communications or demands received from plaintiff?

78. No.

79. If the answer to the preceding interrogatory is "Yes", give the dates and by whom signed.

79. ———.

80. Did the defendant receive written communications from Prince, Keeler & Co. Inc. pertaining to demands made by plaintiff for delivery of apricot kernels and a threat of action by plaintiff if delivery was not made?

80. Yes.

81. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

81. Telegram dated 11 - 1 - 55, signed Prince, Keeler & Co.

82. Did defendant receive from Prince, Keeler & Co. Inc. copies of or extracts from any communications received by Prince, Keeler & Co. Inc. from plaintiff with respect to non-delivery of apricot kernels by defendant to plaintiff?

82. Yes.

83. If the answer to the preceding interrogatory is "Yes", please give the dates of the communications from Prince, Keeler & Co. Inc. and by whom signed.

83. Letter, 11-3-55, signed Wm. Berke.

84. Did defendant receive a letter from Prince, Keeler & Co. Inc. dated October 26, 1955, pertaining to apricot kernels?

84. No record.

85. Did defendant write a letter to Prince, Keeler & Co. Inc. on or about October 31, 1955,

pertaining to the non-delivery of the apricot kernels to plaintiff?

85. Yes.

86. Did defendant receive any letter from Prince, Keeler & Co. Inc. dated November 7, 1955, pertaining to a communication received by Prince, Keeler & Co. Inc. from plaintiff respecting non-delivery of the apricot kernels?

86. Yes.

87. Did defendant, in the month of November, 1955, write a letter to Prince, Keeler & Co. Inc. pertaining to the sale of apricot kernels to plaintiff, and in which said letter defendant promised to cooperate in every way possible to make delivery of said apricot kernels?

87. Yes.

88. Did either defendant or the attorney for defendant write any letters to Rudy Bonzi demanding delivery of apricot kernels or threatening action for non-delivery of apricot kernels, or pertaining to apricot kernels for delivery to plaintiff that have not already been identified in response to preceding interrogatories?

88. Already answered.

89. If there are any such letters, please give the dates and by whom signed.

89. ———.

90. Were there any written communications by

letter or by telegram that passed between Prince, Keeler & Co. Inc and defendant pertaining to the sale of apricot kernels to plaintiff that have not already been identified in response to these interrogatories?

90. No record.

91. If the answer to the preceding interrogatory is "Yes", please give the dates and by whom signed.

91. ———.

Please take notice that a copy of the answers to the foregoing interrogatories must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

Dated: September 11, 1956.

EISNER & TITCHELL,
/s/ By NORMAN A. EISNER,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Answers to Interrogatories signed by Raymond J. O'Connor, Attorney for Defendant.]

[Endorsed]: Interrogatories filed September 11, 1956. Answers filed November 16, 1956.

[Title of District Court and Cause.]

APPROVAL OF FINDINGS OF FACT, CON-
CLUSIONS OF LAW AND JUDGMENT
AS TO FORM

Plaintiff having heretofore submitted Findings of Fact, Conclusions of Law and Judgment by and through its attorney Norman A. Eisner of the firm of Eisner & Titchell, to defendant by and through Raymond J. O'Connor, its attorney, for approval or disapproval as to form, and defendant having examined the same, approves said documents as to form but not as to substance and content.

Dated: April 22nd, 1957.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche presiding without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary having been duly heard and

considered, and the said action having been submitted, the court does now render its decision and finds as follows:

Findings of Fact

The court finds the following to be the facts:

1. That plaintiff is a corporation incorporated under the laws of the State of New York.

2. That defendant is a corporation incorporated under the laws of the State of California.

3. That on or about the 1st day of September, 1955, defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from defendant, approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100# net bags, Sunset brand, at 17½¢ per pound, f.o.b. west coast dock, terms, less 2%—2 days' sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said sale was made subject to approval by buyer of two bags of apricot kernels then enroute as samples.

4. That said purchase and sale was negotiated through Prince Keeler & Co. Inc. of New York, acting as broker. That on or about said first day of September, 1955, said Prince Keeler & Co. Inc. acting as broker and as agent of both seller and buyer, issued and signed a written memorandum of said sale, one signed copy of which, designated as "bought note", was delivered to and received by plaintiff, and one signed copy of which designated as "sold note", was delivered to and received by

defendant. That said bought and sold notes fully set forth the terms of said sale. That said memorandum further sets forth that the sale is subject to confirmation of seller and approval of sample by buyer. That it further recites, "This memorandum shall be subordinate to a more formal contract if and when such a contract is executed; in the absence of such contract, this memorandum represents the contract of the parties."

5. That the two bag sample of apricot kernels was received by plaintiff from defendant on or about the 8th day of September, 1955. That on or about said 8th day of September, 1955, plaintiff examined and approved the said sample and notified Prince Keeler & Co. Inc. of said approval. That on the same day Prince Keeler & Co. Inc. by letter informed defendant that plaintiff had approved the sample.

6. That defendant confirmed said sale, and repeatedly, both orally and in writing, recognized and ratified the said contract of sale, and likewise in writing ratified the act and authority of Prince Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

7. That there is and for many years prior to the commencement of this action has been, a general and well established trade custom and usage among those engaged in the California apricot kernel trade, that the term "regular apricot kernels" means, identifies and describes apricot kernels in any delivery of which the broken kernels shall not

exceed 5% by weight. That according to trade practice, said tolerance of broken kernels is sometimes set forth in contracts of sale of regular apricot kernels and sometimes it is not set forth, but when not set forth it is implied. That the sample of apricot kernels submitted by defendant to plaintiff was a type sample representative of quality and had nothing to do with the quantity or percentage of broken kernels that would be present in any delivery under the contract. That said trade custom and usage is a part of the contract of sale by defendant to plaintiff.

8. That it was not intended by the parties that the existence of a contract should be dependent on the execution of a formal contract; that no formal contract was ever executed and that the broker's memorandum constitutes the contract of the parties.

9. That from and after the first day of September, 1955 and until November 16, 1955, defendant, both orally and in writing, repeatedly promised and assured plaintiff that it would make delivery under said contract. That from the first day of September, 1955 until the 16th day of November, 1955, the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, gradually rose from 17½c per pound, and which was the market price on September 1, 1955, to 43c per pound which was the market price on November 16, 1955. That plaintiff relied upon the promises and assurance of defendant to its detriment. That defendant for the

first time refused to make delivery on November 16, 1955 and at which time the market price had risen to 43c per pound, far in excess of that price at which plaintiff could and would have purchased said regular apricot kernels if not led to believe that defendant would perform the contract. That defendant is by its conduct estopped to rely upon the statute of frauds as a defense in this case and estopped to deny the existence of the contract.

10. That from and after the first day of September, 1955 until the 16th day of November, 1955, the defendant repeatedly and consistently promised and assured plaintiff that it would deliver the 75 tons of regular apricot kernels and fulfill the terms of said contract. That on November 16, 1955 defendant for the first time refused to perform said contract and refused to make delivery of any of the regular apricot kernels called for by said contract. That at the time of said refusal the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, was 43c per pound

11. That plaintiff made repeated demands upon defendant for performance, and duly complied with all the terms and conditions of said contract on its part. That defendant has failed and refused to perform on its part.

12. That it is not true that said complaint fails to state a claim against the defendant upon which relief can be granted, and that it is not true that plaintiff's cause of action is barred by Section 1724 of the Civil Code or Section 1973(a) of the Code of Civil Procedure of the State of California.

Conclusions of Law

From the foregoing Findings of Fact the court concludes that plaintiff has suffered damages by reason of the breach of contract by defendant, represented by the difference between the market price of 75 tons of regular apricot kernels, f.o.b. west coast dock, on November 16, 1955, which was 43c per pound, and 17½c per pound, the contract price. That said difference amounts to \$38,250.00. By reason of the fact that the prayer of the complaint is for \$37,500.00, plaintiff is entitled to judgment that it do have and recover from defendant the sum of \$37,500.00, together with costs of suit incurred herein.

Let Judgment Be Entered Accordingly.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

The foregoing Findings are hereby approved as to form.

Dated April 15th, 1957.

/s/ EISNER & TITCHELL,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1957.

In the United States District Court, Northern
District of California, Southern Division

No. 35103

AMERICAN ALMOND PRODUCTS CO. INC.,
a corporation, Plaintiff,

vs.

SUNSET-STERNAU FOOD CO., a corporation,
Defendant.

JUDGMENT

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche presiding without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary, having been duly heard and considered, and said cause having been submitted, and the court having rendered its decision herein, and Findings of Fact and Conclusions of Law having been duly made and filed;

Now, Therefore, in accordance therewith, It Is Hereby Ordered, Adjudged and Decreed that plaintiff, American Almond Products Co. Inc., a corporation, do have and recover from Sunset-Sternau Food Co., a corporation, the sum of \$37,500.00, together with costs of suit taxed in the sum of \$111.80.

Done in open court this 2nd day of May, 1957.

/s/ MICHAEL J. ROCHE,

Judge of the U. S. District Court.

Entered in Civil Docket 5/2/57.

[Endorsed]: Filed May 2, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To American Almond Products Co. Inc., a Corporation, Plaintiff, and its attorneys Eisner & Titchell:

Please Take Notice that on the 27th day of May, 1957, at the hour of 9:45 o'clock A. M. of said day, or as soon thereafter as the matter may be heard, the defendant will move His Honor, Judge Michael J. Roche in his Courtroom, United States Court House and Post Office Building, Seventh and Mission Streets, San Francisco, California, for an order vacating the judgment heretofore entered on the 2nd day of May, 1957, in favor of plaintiff and for an order granting a new trial upon the following grounds:

1) The Findings of Fact are against the evidence.

2) The Findings of Fact and Conclusions of Law are against the law.

3) The Court erred in finding as a fact that there was a contract in writing entered into between plaintiff and defendant which formed the basis of plaintiff's case.

4) That the Court erred in finding as a fact that a contract was entered into between plaintiff and defendant on or about September 1, 1955.

5) That the Court erred in finding as a fact that a written memorandum of sale issued by a broker constituted a contract between the plaintiff and defendant herein.

6) That the Court erred in finding as a fact that plaintiff approved a sample of apricot kernels submitted by defendant to plaintiff.

7) That the Court erred in finding as a fact that defendant confirmed the sale orally and in writing, recognized and ratified said contract, and in further finding that defendant ratified the authority of the broker in executing the memorandum of sale on behalf of defendant.

8) That the Court erred in finding that there was a trade custom and useage of those engaged in the business of selling apricot kernels and that said trade custom and useage was part of the alleged contract of sale between plaintiff and defendant herein.

9) That the Court erred in finding as a fact that the parties to this action did not intend that the existence of a contract should be dependent upon execution of a formal contract and that the broker's memorandum constituted a contract between the parties.

10) That the Court erred in finding as a fact that defendant promised and assured plaintiff it would make delivery of said contract, to wit, the broker's memorandum, and that plaintiff relied upon the promises and assurances of defendant of delivery under the memorandum to its detriment; that the Court erred in finding as a fact that defendant for the first time refused to make delivery on November 16th, 1955; that the Court erred in finding as a fact that defendant by its conduct is estopped to rely upon the Statute of Frauds as a

defense and is estopped to deny the existence of the contract.

11) That the Court erred in finding as a fact that plaintiff complied with all the terms and conditions of said alleged contract, to wit, the broker's memorandum, and that defendant failed and refused to perform on its part.

12) That the Court erred in finding as a fact that it is not true that the complete failure to state a claim against the defendant and in further finding that it is not true that plaintiff's cause of action was barred by Section 1724 of the Civil Code or Section 1973 (a) of the Code of Civil Procedure of the state of California.

13) That the Court erred in admitting evidence of trade usage and custom as part of plaintiff's case and in finding that said trade usage and custom became and was a part of the alleged contract between the parties hereto as evidenced by the broker's memorandum of September 1, 1955.

14) That the Court erred in excluding evidence offered by defendant that plaintiff had knowledge of the fact that defendant would not accept the broker's memorandum of sale of the kind involved in this case as a contract between the parties and that plaintiff knew that defendant only recognized orders for purchase which were reduced to a formal contract of defendant to be executed by both parties to the transaction.

15) That the Court erred in entering judgment for plaintiff.

The defendant will likewise move the Court at

said time and place for an order modifying and/or vacating the Findings of Fact and Conclusions of Law submitted by plaintiff and adopting the Findings of Fact and Conclusions of Law submitted by defendant which are attached hereto and made a part of this motion.

This motion will be based on the files, records, exhibits and transcript of testimony taken in this action.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action, having come on regularly for trial before the above entitled court, Honorable Michael J. Roche, Judge Presiding, without a jury, Norman A. Eisner of the firm of Eisner & Titchell appearing on behalf of the plaintiff, and Raymond J. O'Connor on behalf of defendant, and evidence, oral and documentary, having been duly heard and considered, and the said action having been submitted, the court does now render its decision and finds as follows:

Findings of Fact

The Court finds the following to be the facts:

1) That plaintiff is a corporation incorporated under the laws of the State of New York.

2) That defendant is a corporation incorporated under the laws of the State of California.

3) That on or about the 1st day of September, 1955, plaintiff authorized the firm of Prince, Keeler & Co., Inc., of New York, a food brokerage firm, to place an order with defendant for the purchase by plaintiff from defendant of approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100# net bags, Sunset brand, at 17½ per pound, f.o.b. west coast dock, terms, less 2%—2 days sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said order was made subject to approval by plaintiff of two bags of apricot kernels.

4) That on or about the 1st day of September, 1955, said firm of Prince, Keeler & Co., Inc., acting as food brokers, issued an offer in writing authorized by plaintiff to defendant wherein plaintiff would agree to buy from defendant the apricot kernels under the terms and conditions set forth in paragraph 3) of these Findings and that said offer was received by defendant. That thereupon said defendant issued its formal contract and sent the same to the firm of Prince, Keeler & Co., Inc., requesting that said contract be executed by plaintiff. That Prince, Keeler & Co., Inc., orally informed plaintiff of its receipt of said contract and the terms contained therein on September 8th, 1955; that plaintiff at all times prior to said date and on said date knew and was aware of the fact that defendant would not recognize a written order or memorandum from a broker as binding upon itself

but did, in fact, only recognize any order for purchase when its formal contract had been signed by the proposed purchaser, in this case, the plaintiff in this action; that upon said date plaintiff refused to accept said contract or the terms thereof and instructed Prince, Keeler & Co., Inc., to return said contract to defendant for modification by including therein the clause "merchandise not to exceed 5% by weight of broken kernels"; that on said date September 8th, 1955, plaintiff informed said brokers that the sample sent by defendant was acceptable in part and non-acceptable in part due to the fact that "the broken kernels far exceeded the normal tolerance." That pursuant to the instructions of plaintiff said brokers notified defendant of the objections of plaintiff to the contract and to the sample by mail, in writing. That on September 21st, 1955, defendant notified said brokers that they were unable to comply with the demands of plaintiff in that they could not meet the requirement that the apricot kernels to be delivered under the proposed order not exceed 5% by weight of broken kernels.

5) That the two bag samples of apricot kernels received by plaintiff from defendant on or about September 8th, 1955, were not approved by plaintiff.

6) That it was intended by plaintiff and defendant that a formal written contract should be entered into between them for the purchase and sale of the apricot kernels, the order for which had been placed by said food brokers Prince, Keeler &

Co., Inc.; that no formal written contract was entered into between the parties hereto; that the formal written contract made and issued by defendant was rejected by plaintiff.

7) That defendant was engaging in the sale of apricot kernels as a new business and was totally unaware of trade custom and useage among those regularly engaged in the California apricot kernel trade; that plaintiff was well aware of this fact; that it is in dispute as to whether there existed general and well established trade custom and useage among those engaged in the California apricot kernel trade that apricot kernels in any delivery shall not contain broken kernels which shall exceed 5% by weight of any delivery, which is binding upon those engaged in said business, but it is not in dispute that defendant was totally unaware of such alleged trade custom and usage and it is further true that plaintiff in this action did not rely upon such alleged trade custom and useage to attach to a written contract, but in fact demanded of defendant that it place such condition in the formal contract that the parties intended to be executed between them.

8) That the food brokerage firm of Prince, Keeler & Co., Inc., of the City of New York, were not the agents of defendant nor were they empowered to execute on behalf of defendant a contract in writing. That Prince, Keeler & Co., Inc., of New York did not have authority in writing to bind defendant herein to any contract. That Prince,

Keeler & Co., Inc., recognized their lack of authority to act as agent for or to bind defendant and that plaintiff was aware of such fact.

9) That the claim of plaintiff herein set forth in its complaint, against defendant, is barred by Section 1724 of the Civil Code and Section 1973(a) of the Code of Civil Procedure of the State of California.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes that judgment should be entered in favor of the defendant together with costs of suit incurred herein.

.....

Judge of the U. S. District Court.

Points and Authorities In Support of Motion
Rules 52 and 59, Rules of Civil Procedure.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and, the defendant having filed herein a Motion for New Trial and Vacation and Modification of the Findings of Fact and Conclusions of Law,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein until this Court rules upon said Motion for New Trial and be further stayed for a period of ten (10) days thereafter.

Done In Open Court This 13th Day of May, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the arguments made by both parties in the above entitled action on the 28th day of May, 1957, shall be and are to be considered by the court as arguments made both with respect to the motion of defendant for new trial and the motion of defendant for an order vacating the judgment heretofore entered on the 2nd day of May, 1957 in favor of plaintiff, and further for modifying or vacating the Findings of Fact and Conclusions of Law adopted by the trial court.

It Is Further Stipulated by and between the parties hereto that both matters have been properly submitted to the court for its determination thereof.

Dated May 28, 1957.

EISNER & TITCHELL,
/s/ By RANDALL TITCHELL,
Attorneys for Plaintiff.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW
TRIAL AND MOTION TO VACATE JUDG-
MENT HERETOFORE ENTERED

The motions of defendant, Sunset-Sternau Food Co., a corporation for a new trial and for an order vacating the judgment heretofore entered in the above captioned proceeding, having come on regularly to be heard this date before the above entitled court, the matter having been orally argued to the court and having been submitted to it for decision, the court being fully advised in the premises, Now, Therefore,

It Is Hereby Ordered that the motion of defendant, Sunset-Sternau Food Co., a corporation, for a new trial is hereby denied.

It Is Further Ordered that the motion of defendant, Sunset-Sternau Food Co., a corporation, for an order vacating the judgment heretofore entered in the above captioned proceeding, and further requesting the court to modify or vacate its Findings of Fact and Conclusions of Law is hereby denied.

Done in open court this 28th day of May, 1957,
and signed this 3rd day of June, 1957.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court, having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and the defendant having filed herein a notice of appeal,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein for a period of ten (10) days from this date.

Done In Open Court This 5th Day of June, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Sunset-Sternau Food Co., a corporation, the defendant above named, hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the final

judgment entered in this action on the 2nd day of May, 1957.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant and Appellant Sunset-
Sternau Food Co., a corporation.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON JUDGMENT

The above entitled Court, having heretofore entered judgment in favor of plaintiff and against defendant in the above entitled action, and the defendant having filed herein a notice of appeal,

It Is Hereby Ordered that execution be stayed upon the judgment entered herein for a period of ten (10) days from this date.

Done In Open Court This 26th Day of June, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed June 26, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD AND STAYING EXECUTION

It Is Hereby Ordered that Sunset-Sternau Food Co., a corporation, defendant and appellant, be

and it is hereby granted an extension of fifty (50) days from the date hereof to docket the record on appeal, and

It Is Further Ordered that execution on the judgment heretofore rendered herein be and the same is hereby stayed for a period of ten (10) days from the date hereof.

Dated this 16th day of July, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING STAY
OF EXECUTION

It Is Hereby Ordered that execution on the judgment heretofore rendered herein be and the same is hereby stayed for a period of ten (10) days from the date hereof.

Dated this 26th day of July, 1957.

/s/ LOUIS E. GOODMAN,
Judge of the U. S. District Court.

[Endorsed]: Filed July 26, 1957.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL AND TO STAY EXECUTION

Whereas, the defendant in the above entitled action has appealed to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment made and entered against it in said action in the United States District Court, Southern Division, Northern District, in favor of plaintiff in said action on the 2nd day of May, 1957, for \$37,500.00 plus interest at seven (7%) per cent and costs of suit; and,

Whereas, the defendant is desirous of staying the execution of said judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American Casualty Company of Redding, Pennsylvania, a corporation, duly organized and existing under the laws of the State of Pennsylvania, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise, on the part of defendant and does acknowledge itself justly bound in the sum of \$42,000.00 that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the defendant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed, only in part, and all damages and costs which may be awarded against the de-

defendant upon the appeal and that if the defendant does not make such payment within thirty (30) days after the filing of the remittitur in the Court from which the appeal is taken, judgment may be entered in such action on motion of plaintiff (and without notice to the undersigned surety) in his favor against the said surety for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the defendant upon the appeal,

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to defendant of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and release judgment therefor against it and award execution therefor.

In Witness Whereof, the corporate seal and name of the said surety company is hereby affixed and attested at San Francisco, California, by its duly authorized officer this 12th day of August, 1957.

[Seal] AMERICAN CASUALTY COMPANY OF REDDING, PENNSYLVANIA, a corporation,

/s/ By F. W. TROTTER,
Attorney-in-Fact.

The foregoing bond is approved both as to form and sufficiency of surety.

Dated: August 12th, 1957.

/s/ LOUIS E. GOODMAN,
Judge of the U. S. District Court.

Acknowledgment of Service Attached.

Notary Certificate Attached.

[Endorsed]: Filed Aug. 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as provided in the Federal Rules of Civil Procedure: Except Defendant's Exhibit A which does not appear in our files:

Excerpt from Docket Entries.

Complaint.

Acknowledgment of Service and Entry of Appearances.

Answer of Defendant to Complaint.

Motion of Plaintiff for Production and Inspection of Documents.

Affidavit of Plaintiff in Support of Motion for Production and Inspection.

Interrogatories by Plaintiff to Defendant.

Answer of Defendant to Interrogatories by Plaintiff.

Approval as to Form of Findings of Fact, Conclusions of Law and Judgment, by Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Motion of Defendant for New Trial.

Order Staying Execution upon Judgment.

Stipulation of Parties that Arguments be Considered as Having Been Made to Both Motion for New Trial and Motion to Vacate Judgment.

Order Denying Motion for New Trial and Motion to Vacate Judgment.

Order Staying Execution upon Judgment.

Notice of Appeal.

Order Staying Execution upon Judgment.

Order Extending Time to Docket Record on Appeal and Staying Execution.

Order Extending Stay of Execution.

Undertaking on Appeal and to stay Execution.

Reporter's Transcript of Proceedings Feb. 21, 25, 26 and Mar. 25, 1957.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46.

Defendant's Exhibits B and C.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 27th day of August, 1957.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-appellant herewith presents the points upon which it contends that the District Court erred as follows:

1. The Court erred in finding as a fact that there was a contract in writing entered into between plaintiff and defendant which formed the basis of plaintiff's case.

2. That the Court erred in finding as a fact that a contract was entered into between plaintiff and defendant on or about September 1, 1955.

3. That the Court erred in finding as a fact that a written memorandum of sale issued by a broker constituted a contract between the plaintiff and defendant herein.

4. That the Court erred in finding as a fact that plaintiff approved a sample of apricot kernels submitted by defendant to plaintiff.

5. That the Court erred in finding as a fact that defendant confirmed the sale orally and in writing, recognized and ratified said contract, and in further finding that defendant ratified the authority of the

broker in executing the memorandum of sale on behalf of defendant.

6. That the Court erred in finding that there was a trade custom and usage of those engaged in the business of selling apricot kernels and that said trade custom and usage was part of the alleged contract of sale between plaintiff and defendant herein.

7. That the Court erred in finding as a fact that the parties to this action did not intend that the existence of a contract should be dependent upon execution of a formal contract and that the broker's memorandum constituted a contract between the parties.

8. That the Court erred in finding as a fact that defendant promised and assured plaintiff it would make delivery of said contract, to wit, the broker's memorandum, and that plaintiff relied upon the promises and assurances of defendant of delivery under the memorandum to its detriment; that the Court erred in finding as a fact that defendant for the first time refused to make delivery on November 16th, 1955; that the Court erred in finding as a fact that defendant by its conduct is estopped to rely upon the Statute of Frauds as a defense and is estopped to deny the existence of the contract.

9. That the Court erred in finding as a fact that plaintiff complied with all the terms and conditions of said alleged contract, to wit, the broker's memorandum, and that defendant failed and refused to perform on its part.

10. That the Court erred in finding as a fact

that it is not true that the Complaint failed to state a claim against the defendant and in further finding that it is not true that plaintiff's cause of action was barred by Section 1724 of the Civil Code or Section 1973 (a) of the Code of Civil Procedure of the State of California.

11. That the Court erred in admitting evidence of trade usage and custom as part of plaintiff's case and in finding that said trade usage and custom became and was a part of the alleged contract between the parties hereto as evidenced by the broker's memorandum of September 1, 1955.

12. That the Court erred in excluding evidence offered by defendant that plaintiff had knowledge of the fact that defendant would not accept the broker's memorandum of sale of the kind involved in this case as a contract between the parties and that plaintiff knew that defendant only recognized orders for purchase which were reduced to a formal contract of defendant to be executed by both parties to the transaction.

13. That the Court erred in entering judgment for plaintiff.

14. That the Court erred in refusing to adopt the Findings of Fact and Conclusions of Law submitted by defendant and appellant.

/s/ RAYMOND J. O'CONNOR,
Attorney for Defendant and
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 27, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by the counsel for appellant:

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

In the United States District Court, Northern
District of California, Southern Division

No. 35,103

AMERICAN ALMOND PRODUCTS COM-
PANY, INC., Plaintiff,

vs.

SUNSET-STERNAU FOOD COMPANY, a cor-
poration, et al., Defendants.

REPORTER'S TRANSCRIPT

February 21st, 1957

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Messrs. Eisner
& Titchell, represented by Norman A. Eisner, Es-
quire. For the Defendants: Raymond J. O'Connor,
Esq. [1]*

The Clerk: American Almond Products versus
Sunset-Sternau Food Company; pre-trial confer-
ence and trial.

Mr. Eisner: Ready.

Mr. O'Connor: Ready, your Honor.

The Court: I don't know whether you gentlemen
are familiar with our new order of things here. We
are supposed to have a pre-trial conference in all
these matters.

Is there any prospect of a settlement in this
case?

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

Mr. O'Connor: I would say no, your Honor.

Mr. Eisner: I think that is true.

The Court: Now, is there anything in regard to Amendments to Pleadings?

Mr. O'Connor: As far as amending the Answer is concerned, I would ask leave of the Court at this time that Paragraph 4 of the Answer on file be amended on its face at line 15. Section 1973 is cited. It should be Section 1973(a) of the Civil Code of Procedure.

The Court: No objection?

Mr. Eisner: No objection.

The Court: Limitation of Expert Witnesses. Do we have any difficulty in this case?

Mr. Eisner: We shall have, I believe, two expert witnesses.

The Court: One won't be sufficient for your case?

Mr. Eisner: We would just limit it to two. [2]

The Court: What about you?

Mr. O'Connor: None, your Honor.

The Court: Is there any way we can simplify the issues in this case?

Mr. O'Connor: I have this suggestion, if the Court please: The question, as I see it, in this case resolves itself into the primary question, was there a contract? And on the determination of that question would be the question of whether there were any damages?

The Court: Written or oral?

Mr. Eisner: Written contract, if the Court

please. They plead the Statutes of Frauds but we claim there is compliance and ramification also.

Mr. O'Connor: We claim, on the other hand, if the Court please, that there was not at any time a contract, written or oral, in addition to citing the Statute of Frauds in the matter.

The Court: Admissions of fact in relation to the documents that are to be presented here in this case.

Mr. Eisner: The documents for the most part, if the Court please, are included in the deposition that has been taken and the documents are identified which I propose to read into the record.

The Court: Produce them now and we will mark them for purposes of identification. [3]

Mr. Eisner: They are photostatic copies.

The Court: No objection to the photostatic copies?

Mr. O'Connor: No objection to the photostatic copies, your Honor.

Mr. Eisner: Then the documents have already been identified in the deposition as 1 for Identification through 32, and we ask that they be marked in the same order.

The Court: No objection?

Mr. O'Connor: No objection.

The Court: So ordered.

The Clerk: Plaintiff's Exhibits 1 through 32 marked for Identification.

The Court: Are those all the documents?

Mr. Eisner: There may be a few letters that will be introduced in conjunction with the testimony.

The Court: So we make no mistake about the letters, produce them now so counsel has an opportunity to examine them.

Mr. Eisner: Most of these documents are already included in the deposition and I would want the witness to have copies of them or show them to counsel.

The Court: He will show you his copies, if any.

Mr. O'Connor: I have several documents here, your Honor.

(Counsel examining documents.)

The Court: Are there any stipulations that you can enter into? [4]

Mr. Eisner: It seems to me there is one: An allegation of non-delivery. I suppose we can stipulate to that. There has been no delivery under the contract.

Mr. O'Connor: That's right; beyond two samples.

Mr. Eisner: Yes.

The Court: Is there anything else that you gentlemen have in mind that I can assist you with?

Mr. Eisner: I don't think so. Demand for delivery was alleged, but that all appears in the deposition.

The Court: You have heard a great deal about pre-trial conferences.

Mr. Eisner: Yes, we have, if the Court please.

Mr. O'Connor: Yes, your Honor.

The Court: As I remember it, you had many cases before me when I was in the State Court.

Mr. Eisner: I did. I had the pleasure.

The Court: We didn't belabor it, but we did everything we did this morning, didn't we?

Mr. Eisner: Yes, we did. Nothing new. I will say this, if the Court please: I don't think either of us thought, by reason of the simplicity of the issues here and the diversity of ideas, that a pre-trial conference would have been of real service, so that was the reason——

Mr. O'Connor: No, it would not have been.

Mr. Eisner: That was the reason we did not ask for a [5] pre-trial conference.

The Court: It is just as well you didn't, because we could dispose of this matter in a very few minutes and save you a lot of work.

Proceed now, gentlemen.

Mr. Eisner: If the Court please, I would like to read the deposition. This deposition was taken pursuant to stipulation and the usual stipulation that all objections to questions, other than to the form of the question, were reserved. The examination was by myself of Mr. Sternau, Mr. Sydney Sternau.

DEPOSITION OF SYDNEY STERNAU

"Q. (By Mr. Eisner): Mr. Sternau, you are the president, I believe, of the Sternau Food Company—The Sunset-Sternau Food Company?

"A. Yes.

"Q. That is a corporation? A. Yes."

Just to interrupt regarding stipulations, counsel and I have agreed that so far as the corporate existence of the two parties, the corporate existence is admitted.

(Deposition of Sydney Sternau.)

Mr. O'Connor: That is correct, your Honor.

Mr. Eisner: The plaintiff being a corporation organized under the laws of the State of New York, and the defendant under the laws of the State of California.

"Q. A California corporation? A. Yes.

"Q. What business is it engaged in?

"A. Food processing.

"Q. Primarily nuts?

"A. Primarily nuts. [5-A-1]

"Q. And what nuts do you deal in?

"A. Almonds, walnuts, filberts, brazils and pecans, shelled and not shelled, shelled and in the shell.

"Q. And the company has a processing plant, has it? A. Yes.

"Q. One, or more than one?

"A. More than one.

"Q. Where are they located?

"A. Modesto.

"Q. And how many years has the company been in business?

"A. Let me see—56 years, I believe is correct.

"Mr. O'Connor: It was incorporated in 1922.

"Q. (By Mr. Eisner): You market your products throughout the United States, do you?

"A. Yes.

"Q. And you have brokers through whom you deal? A. Yes.

"Q. And is Prince, Keeler & Co., Inc. of New York one of your brokers? A. They are.

(Deposition of Sydney Sternau.)

“Q. How long has Prince, Keeler & Co., Inc. of New York been acting as a broker for the Sunset-Sternau Food Company?

“A. Six years, approximately — approximately six years.

“Q. And this concern of Prince, Keeler & Co., Inc. acts as your broker and sells for Sunset-Sternau Food Company, the products that you market in the State of New York and its vicinity?

“A. They operate as a sales broker only. [5-A-2]

“Q. As a sales broker?

“A. Yes, in New York City and Brooklyn and the vicinity of New York—Metropolitan New York is better.

“Q. About what volume of business does Prince, Keeler & Co., Inc. handle for Sunset-Sternau Food Company in a year?

“A. I couldn't tell you.

“Q. Well, does it run into a large quantity?

“A. I don't know what the figures are—the exact figures.

“Q. What are the approximate figures?

“A. I don't know the approximate figures.

“Q. Well, do they sell for you—and when I say “you” I mean the Sunset-Sternau Food Company—the various products that you market in the State of New York and its vicinity? A. Yes.

“Q. In July, 1955, were you in New York?

“A. I don't believe so; I am not sure of the date; I know I was in New York in July, but I am not sure of the date, for certain.

(Deposition of Sydney Sternau.)

“Q. I didn’t ask you any particular date; in July? A. I was in July, yes.

“Q. Do you know a Mr. Astrack? A. Yes.

“Q. Who is Mr. Astrack?

“A. A salesman with Prince, Keeler & Co.

“Q. In July, 1955, did you and Mr. Astrack call upon [5-A-3] the American Almond Products Company in New York? A. Yes.

“Q. And whom did you see there?

“A. I think Mr. Kaplan.

“Q. When you and Mr. Astrack of Prince, Keeler & Co., Inc. called on Mr. Kaplan, did you tell Mr. Kaplan that Sunset-Sternau Food Company had apricot kernels that it offered for sale?

“A. We told them that we thought we would have some apricot kernels for sale.

“Q. Did you tell him what quantity you had for sale?

“A. We didn’t know at that time the quantity.

“Q. You didn’t mention any quantity?

“A. I don’t believe so, at that time.

“Q. Did you tell him that your price would be that of your competitors?

“A. We told him, I think, that we would be competitive.

“Q. Had you ever sold apricot kernels before?

“A. No.

“Q. How did you happen to offer apricot kernels for sale at this time?

“A. Because we have always had apricot kernels—apricots—in the shell, that we have from our

(Deposition of Sydney Sternau.)

cannery operations, and we always sell them to this man Bonzi, and we approximately had 150 wet tons of our own of them, and [5-A-4] Bonzi approached us to work together and try to sell them with him; that is how we offered them.

“Q. In other words, if I understand you correctly, you had about how many—150 tons.

“A. 150 tons of wet kernels.

“Q. And did Mr. Bonzi have other wet kernels?

“A. Yes, Mr. Bonzi made it a business to dry kernels.

“Q. Is Mr. Bonzi in the business of buying the refuse from canneries? A. Yes.

“Q. And in that way he gets apricot pits, does he? A. Yes.

“Q. So, prior to your trip to New York, then, you had made some arrangement with Mr. Bonzi whereby you were going to sell apricot kernels, is that correct? A. Yes, that is correct.

“Q. I show you this letter and ask you if it is a photostatic copy of a letter that you received from Prince, Keeler & Co., Inc.

“Mr. O'Connor: We can shorten this up, Mr. Eisner; that is calling for his independent recollection; I can show him, in some of these instances, we have the original letters in our file, and those are the ones that you have been supplied to you upon request, I think we can agree on some of these questions that these are correct photostatic copies.

“Mr. Eisner: Will it be stipulated that this letter [5-A-5] dated July 25, 1955, is a photostatic

(Deposition of Sydney Sternau.)

copy of the original of a letter received by the Sunset-Sternau Food Company from Prince, Keeler & Co., Inc.?

“Mr. O’Connor: Yes, here is the original; there is no question about it.

“Mr. Eisner: We offer this as plaintiff’s exhibit No. 1 for identification.”

We now offer Exhibit No. 1 in evidence.

The Court: It will be admitted and marked.

Mr. Eisner: In order that the Court may be familiar with the development, I would like to read it into the record. This is a letter on the letterhead of Prince, Keeler & Co., Inc., Manufacturer’s Representative, July 25, 1955, addressed to Sunset-Sternau Food Company, Modesto, California.

(Whereupon the letter referred to was read in its entirety by Mr. Eisner.)

(Reading of deposition continued as follows.)

“Q. (By Mr. Eisner): Now, Mr. Sternau, this letter says, dated July 25, 1955:

‘Last week Mr. Sternau with Mr. Astrack of this office, called on American Almond Products Co., Inc. with the view to selling them Apricot Kernels.’

Is that correct? A. That is correct.

“Q. It further states:

‘This morning we had a call from Mr. Kaplan of [5-A-6] American Almond, asking the following questions:

1. Can you ship him by Railway Express imme-

(Deposition of Sydney Sternau.)

diately 200 lbs. of these Apricot Kernels, which he needs for a test run in his laboratory?

2. Are these Apricot Kernels, that is the 75 tons, available for prompt shipment, or for shipment in 30 days, or just when they will be available.'

I will ask you if in this conversation with Mr. Astrack and with Mr. Kaplan you offered Mr. Kaplan of American Almond Products 75 tons of the apricot kernels?

"A. Yes, that is correct.

"Q. And Mr. Kaplan wanted to know—reading from the letter:

'3. Mr. Kaplan wanted to know if he requested, say, 30/50 tons in August, would you be in a position to ship at that time?

Would you give us your best estimate as to when these kernels will be ready, and in the meantime get off the 200 lbs. to Mr. Kaplan at the following address:

American Almond Products Co., Inc., 103
Walworth Street, Brooklyn, New York.

Your prompt cooperation on the above will be appreciated.'

"Q. Now, then, Mr. Sternau, did you reply to that [5-A-7] letter, as far as you can recall?

"A. I don't recall.

"Q. I show you this document—that is not one from Mr. O'Connor's file, but it is certified by Mr. Sullivan as being a copy of the letter which was mailed——

(Deposition of Sydney Sternau.)

“Mr. O’Connor: That is one of those letters which you told me of?

“Mr. Eisner: Yes, one which you apparently could not produce.

“Q. Do you recognize that?

“A. No, I don’t remember the letter.

“Q. You don’t remember the letter after reading it? A. No.

“Q. I will ask you, did you send this letter?

“A. I don’t remember sending it—it is not under our letterhead, and I don’t remember it.

“Q. (By Mr. O’Connor): In other words, you haven’t any independent recollection of sending it?

“A. Yes, I could have sent it, but I have no recollection of sending it.

“Mr. Eisner: Are you willing to stipulate that this is a copy of a letter that is certified as a true copy by Frank L. Sullivan—

“Q. Do you know Frank L. Sullivan? Who is he?

“A. A salesman for Prince, Keeler & Co., Inc.

“Q. Is he an officer of Prince, Keeler & Co., Inc.? [5-A-8]

“A. I couldn’t tell you that—he is a salesman from Prince, Keeler & Company.

“Q. Did you notice that it is certified under his signature as correct—do you recognize his signature?

“Mr. O’Connor: I have a letter with his signature right; apparently that is his signature, counsel.

“Mr. Eisner: Will you stipulate, counsel, that

(Deposition of Sydney Sternau.)

this is a copy of a letter by the Sunset-Sternau Food Company to Prince, Keeler & Co., Inc.?

Mr. O'Connor: I will stipulate that this is a certification by Frank L. Sullivan, but we don't have the original of the letter, and apparently not a copy of the letter, so I am not going to be able to stipulate to it; I assume that Prince, Keeler & Company have the original letter.

"Mr. Eisner: Certainly Prince, Keeler & Company has the original of the letter, and made this copy and certified to it as correct; I have shown it to the witness, and after this conversation, neither the witness is willing to identify it, nor are you willing to stipulate that it is a copy of a letter that was sent.

"Mr. O'Connor: I am not in a position to do so.

"Mr. Eisner: We will offer this in evidence for identification.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 2 for identification.)" [5-A-9]

Mr. Eisner: Now, I will say that thereafter a request was made of counsel to admit the genuineness of this letter, and counsel has in writing admitted the genuineness of the letter.

Mr. O'Connor: Yes. There is a stipulation on file.

Mr. Eisner: So we offer the letter in evidence as plaintiff's Exhibit No. 2.

The Court: So ordered.

(Whereupon the certified copy of letter re-

(Deposition of Sydney Sternau.)

ferred to was admitted in evidence as Plaintiff's Exhibit No. 2.)

Mr. Eisner: This letter is dated August 22, 1955, Prince, Keeler & Company, 99 Hudson Street, New York, New York, Attention: Mr. William Berke.

Mr. O'Connor: May I interrupt at this time? It may save some time, counsel. There are a few of these letters, your Honor, which are rather lengthy and they have paragraphs relating to the issues in this case. In this particular letter I notice the fourth paragraph is the only paragraph referring to the matter at issue before the Court, and we can shorten it up.

Mr. Eisner: I appreciate your suggestion, but I think, rather than try to pick it up, the documents are not long; I think it would be easier to just read them in as they are.

Mr. O'Connor: There are quite a few lengthy letters here.

The Court: If he takes the position he wants them all read, [5-A-10] he is entitled to it under the law.

Mr. O'Connor: I was trying to shorten it up, your Honor.

Mr. Eisner: It won't take long.

The Court: Very well.

(Whereupon Mr. Eisner read the letter in its entirety and then continued as follows with the reading of the deposition.)

"Q. (By Mr. Eisner): I notice in this letter,

(Deposition of Sydney Sternau.)

which has been marked Plaintiff's Exhibit No. 2 for identification, Mr. Sternau, that it states:

'We hope to be able to ship the 200 pounds of Almond Pits some time this week to American Almond Products.'

I will ask you, when it says 'almond pits', is that a misnomer, and does it refer to apricot pits or apricot kernels?

"A. It could; we couldn't call them almond pits.

"Q. Is there any such thing as almond pits?

"A. Not that I know of, no.

"Q. And this letter of August 22nd purports to be a letter in response Exhibit No. 1 for identification; I notice that it states in this letter:

'Please keep us advised if you hear any opening prices anywhere on Apricot Kernels, as we told American Almond Products that our price will be no higher than our competitors.' [5-A-11]

Is that what you told Mr. Kaplan when you had that conversation with him? A. We did.

"Q. 'As this is a new item for us and there are only a few buyers in the country, we certainly hope to be able to sell our whole output in the Metropolitan New York market.'

Is that correct? A. Yes, that is correct.

"Q. As I understand it, Prince, Keeler & Co., Inc., was your representative in the New York market?

"A. They are our brokers in the New York market.

"Mr. O'Connor: Let me make a statement for

(Deposition of Sydney Sternau.)

the record: Mr. Eisner, you and I will get along a little better if you will drop that accusatory tone in your voice here.

“Mr. Eisner: I don’t mean to have an accusatory tone, but I am a little disconcerted, frankly, that a letter which obviously was written by the witness is refused to be identified; you can make your own deduction, but I am not——

“Mr. O’Connor: Personally, I don’t care what you think; I will stipulate to anything which is obvious; I just don’t so happen to have that letter in our files; it might be lost in the other file; any assumption by you, frankly, I am not concerned with, but I am concerned with this; in the taking of a deposition I don’t understand that it is necessary to get into any personalized feelings or to use an accusatory tone of voice, and I frankly won’t stand for it; you can ask the question on any matters of fact and I will [5-A-12] not object to those at all.

“Mr. Eisner: Well, we will get along.”

Mr. O’Connor: Thereupon the accusatory tone ceased, your Honor.

The Court: They are still good friends, are they?

Mr. Eisner: I don’t think I ever used any accusatory tones.

The Court: Knowing Mr. Eisner as well as I do for 40 years, I don’t think we will have any trouble at all.

“Q. Now, Mr. Sternau, I show you what purports to be a photostatic copy or a letter dated August 24, 1955, and ask you if you will identify it as

(Deposition of Sydney Sternau.)

a photostatic copy of a letter which you received from Prince, Keeler & Co., Inc.?

"A. Yes.

"Mr. Eisner: We offer this as next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 3 for identification.)"

Mr. Eisner: We offer it in evidence as Exhibit No. 3.

The Court: So ordered.

(Whereupon letter dated August 24, 1955, Prince, Keeler & Co., Inc. to Mr. S. M. Sternau was received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Eisner: I will read the letter. It is a letter on the letterhead of Prince, Keeler & Co., Inc., dated August 24, 1955, addressed to Mr. S. M. Sternau, Sunset-Sternau Food Co., Modesto, California:

(Whereupon the letter referred to was read into the record by Mr. Eisner.)

"Q. (By Mr. Eisner): Mr. Sternau, I notice in this letter that it starts out:

'We have your letters of August 22nd.'

Now, I will ask you again, in view of the statement in this letter, that 'we have your letters of August 22nd', whether or not you can identify Plaintiff's Exhibit No. 2 for identification as a copy of a letter written by you?

"A. No, I don't identify it.

"Q. Do you have any independent recollection of that letter?

(Deposition of Sydney Sternau.)

“A. No; if I had any independent recollection, I would say yes, but I just don’t.

“Q. I notice in this letter, which has been marked Plaintiff’s Exhibit No. 3 for identification, that Prince, Keeler & Co., Inc., writes:

‘Certainly pleased to hear you are shipping American Almond 200 lb. Almond Pits—’

That, again, Mr. Sternau, refers to apricot kernels and not almond pits?

“Mr. O’Connor: I think we can agree on that.

“Mr. Eisner: That is what he said.

“Mr. O’Connor: It is obviously an error.

Mr. Eisner: ‘Hope you are holding this stock for us [5-A-14] till we are able to report to you on same. Up to date your competitors have still not named a price—as soon as we hear prices, will contact you. You still have not advised us how much of this merchandise is available and when you will be able to make shipment after goods are approved. Kindly let us have this information so we can be guided accordingly.’

“Q. Did you make any reply to that letter, Mr. Sternau, prior to August 26, 1955, at the time that you wrote a letter bearing that date?

“Mr. O’Connor: Will you read that last question?

“(Record read by the Reporter.)

“Mr. O’Connor: And Mr. Eisner has submitted a photostat of a letter of August 26 to the witness.

“The Witness: Yes, sir.

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): What reply did you make?

“A. I think the reply is in the letter there.

“Q. In other words, do I understand that this letter of August 26th is the only reply that you made to that letter?

“Mr. Eisner: I will offer this letter as our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 4 for identification.)”

We offer it as Plaintiff’s Exhibit No. 4. [5-A-15]

The Court: So ordered.

(Whereupon letter dated August 26, 1955, S. M. Sternau to Prince, Keeler & Co., Inc., was admitted into evidence as Plaintiff’s Exhibit No. 4.)

Mr. Eisner: It is a letter dated August 26, 1955, addressed to Prince, Keeler & Co., 99 Hudson Street, New York, Attention Mr. William Berke:

(Whereupon Mr. Eisner read the letter referred to into the record. He then continued with the reading of the deposition as follows:)

“Q. (By Mr. Eisner): Now, Mr. Sternau, on August 31, did you receive this telegram from Prince, Keeler & Co., Inc.?

“Mr. O’Connor: Let the record show that I am showing the witness the original telegram, which is in my file, and of which this happens to be a photostat supplied by Mr. Eisner.

“The Witness: Yes.

(Deposition of Sydney Sternau.)

“Mr. Eisner: We offer the telegram in evidence as plaintiff’s exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 5 for identification.)”

Mr. Eisner: We offer this telegram as No. 5.

The Court: It may be marked.

(Whereupon telegram dated August 31, Prince, Keeler & Co. to Sunset-Sternau was received in evidence as Plaintiff’s [5-A-16] Exhibit No. 5.)

Mr. Eisner: It is a telegram dated August 31, 1955, New York, addressed to Sunset-Sternau Food Company, Modesto.

(Whereupon Mr. Eisner read the telegram into the record.)

The Court: The price opened at 17c?

Mr. Eisner: That is what it says in the telegram.

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I will ask you, Mr. Sternau, if upon the same day that you received that telegram, you replied by telegram which I am now showing youc A. Yes.

“Q. In other words, Mr. Sternau, by the wire which has been marked Exhibit No. 5 for identification, Prince, Keeler & Co., Inc. advised you that the price, according to the American Almond Products Company, was 17 cents per pound?

“A. Yes.

“Q. And you replied that you understood that the price was 18 cents and not 17 cents?

(Deposition of Sydney Sternau.)

“A. Yes.

“Mr. Eisner: I will ask that this be marked as plaintiff’s exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 6 for identification.)”

Mr. Eisner: We offer that in evidence as Plaintiff’s Exhibit No. 6, and it is a telegram dated August 31, 1955, addressed to Prince, Keeler & Co., and it reads: [5-A-17]

“Apricot Kernels shipped today. We understand price is 18 cents not 17.

Sunset-Sternau Food Co.”

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): On the following day, September 1st, did you have a telephone conversation with Prince, Keeler & Co., Inc. about the price at which Sunset-Sternau Food Company would see or offer the apricot kernels to the American Almond Products Company?

“A. I don’t remember.

“Q. You have no recollection of the conversation? A. No.

“Q. I show you this letter of September 1, 1955, and ask if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.?

“Mr. O’Connor: So I won’t have to repeat this, in any of these cases where you are using the exhibits previously supplied to you, I am showing them to the witness so that he can make an easy identification.

(Deposition of Sydney Sternau.)

“Mr. Eisner: I have no objection to that.

“Q. While we are referring to that, the letter that you have not identified, that of August 22, 1955, you have not found any letters of that date in your file? A. No.

“Mr. O'Connor: No, we don't have a copy of that letter; [5-A-18] I presume the original is with Prince, Keeler & Company; if it is, I will check that myself; it undoubtedly is.

“Mr. Eisner: It must be, because Prince, Keeler & Co. had the copy of it.

“The Witness: The letter was received by the Company, not by me.

“Mr. Eisner: When I refer to you, I am referring to the Company, Sunset-Sternau Food Company.

“Mr. O'Connor: Let the record show that this particular communication is addressed to Mr. Steve Tarrico, Sunset-Sternau Food Company.

“Q. (By Mr. Eisner): Who is Steve Tarrico?

“A. He is a member of the Company, an officer of the Company, a vice-president.

“Q. Now, referring to this letter which we now offer for identification, and which I will ask be marked, this letter says: (Reading letter.)

Is it a fact, Mr. Sternau, that in the telephone conversation of September 1, 1955, the price of 17½ cents was authorized to Prince, Keeler & Co., Inc. to quote to the American Almond Products Company?

“Mr. O'Connor: If you know, Mr. Sternau.

(Deposition of Sydney Sternau.)

“A. (By the Witness): No, I was not in the office at that time.

“Mr. O’Connor: I call your attention to this, counsel; [5-A-19] obviously it was a conversation with Tarrico, not with Mr. Sternau.

“Mr. Eisner: I realize that; in this letter of September 1, 1955, it is stated in this letter ‘with regard to shipping and packing—this is designated on enclosed contract which we believe will meet with your approval.’

“Mr. O’Connor: Has that letter been identified yet?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 7 for identification.)”

Mr. Eisner: We offer it in evidence as Exhibit No. 7.

The Court: It may be admitted and marked.

(Whereupon letter September 1, 1955, Prince, Keeler & Co., Inc., to Mr. Steve Tarrico was admitted in evidence as Plaintiff’s Exhibit No. 7.)

Mr. Eisner: It is on the letterhead of Prince, Keeler & Co., addressed to Steve Tarrico, Sunset-Sternau Food Company, Modesto, California.

(Whereupon Mr. Eisner read the letter into the record.)

(Continuing with reading of the deposition.)

“Q. (By Mr. Eisner): Now, I show you this document, and ask you whether that is the contract that was—— A. No, sir.

(Deposition of Sydney Sternau.)

“Q. Was that document enclosed with this letter?

“A. It probably was—I don’t know—but that is not [5-A-20] the contract.

“Q. That was the document that was enclosed in the letter?

“A. I couldn’t tell you; I didn’t open the mail; I was not in the office.

“Mr. Eisner: Will it be stipulated that this is the document produced from your files——

“Mr. O’Connor: Yes, that is correct.

“Mr. Eisner: ——that was enclosed with that letter?

“Mr. O’Connor: Obviously it was the enclosure with this letter, yes.

“Mr. Eisner: I will ask that it be marked.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 8 for identification.)”

Mr. Eisner: We offer in evidence this document as Plaintiff’s Exhibit next in number.

The Court: It may be admitted and marked.

(Whereupon Plaintiff’s Exhibit No. 8 for identification was received in evidence as Plaintiff’s Exhibit No. 8.)

Mr. Eisner: This is on the heading of Prince, Keeler & Co., Inc. It is given a number 9-12079, dated 9-1-55. (Whereupon Mr. Eisner read the document into the record.)

(Reading of deposition continued.)

“Q. (By Mr. Eisner): Now, Mr. Sternau, upon

(Deposition of Sydney Sternau.)

September 6, 1955, was this document prepared in your office? [5-A-21]

"A. Yes.

"Q. How many copies of that were prepared?

"A. Three.

"Q. Do you have the three copies?

"A. Yes.

"Q. May I see them, please?

"Mr. O'Connor: These, I think, were supplied to you, counsel.

"Mr. Eisner: Just one was supplied to me; I would like to see the three of them.

"Q. Now, Mr. Sternau, did you send the three copies of this document to Prince, Keeler & Co., Inc.?"

"A. Yes.

"Mr. Eisner: I will ask that this be marked as our exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 9 for identification.)"

Mr. Eisner: We offer this as Exhibit No. 9.

The Court: It may be admitted and marked.

(Whereupon the contract referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Eisner: This is on Sunset-Sternau Food Company heading, dated September 6, 1955, and it is a sales contract.

(Whereupon Mr. Eisner read the document into the record.)

Mr. O'Connor: I don't think it is necessary to

(Deposition of Sydney Sternau.)

read it entirely, the conditions on the back of the document. [5-A-22]

Mr. Eisner: It is not photostated here.

Mr. O'Connor: If that is the case, then I would offer, if the Court please, instead of the photostat in this case, the complete document. They are made out in triplicate and they do have conditions on the back.

Mr. Eisner: I have no objection to the substitution of the three documents that counsel is producing, of which the other was a photostatic copy.

Mr. O'Connor: Fine. Then it would be stipulated, too, counsel, that this document was never executed?

Mr. Eisner: That is right.

The Court: Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(The documents referred to were admitted in evidence as Defendant's Exhibit A.)

(Continuing with reading of deposition.)

"Q. (By Mr. Eisner): When you sent this document to Prince, Keeler & Co., Inc., you sent it in triplicate, did you? A. Yes.

"Q. Did you write any letter when you sent it?

"A. Generally, a form letter goes with it.

"Q. Did any form letter go in this instance?

"A. They always go.

"Q. I have asked for the production of any document [5-A-23] that was sent with this letter; do you have any copy of any document that was

(Deposition of Sydney Sternau.)

sent with this letter? Do you have any copy of any document that accompanied this?

"A. Yes, we probably have it in our contract file—we will look.

"Mr. O'Connor: I don't have it, Mr. Eisner; if a form letter was sent, apparently there are no copies—I will check.

"Q. (By Mr. Eisner): When you sent——

"Mr. O'Connor: May it be understood, Mr. Eisner, that when you say 'you' sent it, that does not imply that Mr. Sternau himself sent the documents?

"Mr. Eisner: When I say 'you,' I am referring to the Company; I don't assume that Mr. Sternau attends to all of the details.

"Q. (By Mr. O'Connor): Do you personally send these out?

"A. Never—never see the form letter, either.

"Q. (By Mr. Eisner): Now, Mr. Sternau, did Sunset-Sternau Food Company send 200 pounds of apricot kernels to American Almond Products Company?

"A. I believe they were shipped by Mr. Bonzi.

"Q. Did you tell Mr. Bonzi to ship the apricot kernels to American Almond Products?

"A. I personally didn't tell him, but probably he was told to ship them to the American Almond Products. [5-A-24]

"Q. Mr. Sternau, I call your attention to the telegram which has been marked Plaintiff's Exhibit No. 6 for identification, in which it is stated

(Deposition of Sydney Sternau.)

‘apricot kernels shipped today’; does that refresh your recollection, Mr. Sternau, as to whether or not the 200 pounds of apricot kernels were shipped on that date?

“A. No, it wouldn’t refresh my memory.

“Q. Did you send that telegram personally?

“A. I don’t think so—I could—no, I did not; I don’t believe I was in the office on that date.

“Q. And is it your testimony, then, that the 200 lbs. of apricot kernels were shipped by Bonzi?

“A. I believe so.

“Q. Did you have any conversation with Mr. Bonzi pertaining to the shipment of those 200 lbs. of apricot kernels?

“A. No, I don’t believe I did, personally.

“Q. How do you know that the apricot kernels were shipped by Bonzi?

“A. Because I believe Mr. Hansaw in our office, and Mr. Tarrico, advised me.

“Q. Now, Mr. Sternau, who cracked those 200 lbs. of apricot kernels?

“A. I believe they were cracked by Continental Nut Company at Chico.

“Q. Did Sunset-Sternau Food Company have anything to [5-A-25] do with having those kernels cracked?

“A. None whatsoever—Mr. Bonzi handled it.

“Q. In other words, Sunset-Sternau Food Company expected to receive these cracked apricot kernels from Mr. Bonzi?

“A. Do you mean the 200 lbs.?

(Deposition of Sydney Sternau.)

"Q. Well, this 200 lbs.?"

"A. I couldn't tell you if Mr. Bonzi was having Continental ship them direct from Chico to American Almond Products or not; I don't remember any of the details of it.

"Q. Did Mr. Bonzi have these 200 lbs. cracked and ship them at the request of Sunset-Sternau Food Company? A. Yes.

"Q. Now, Mr. Sternau, I show you a letter dated September 8, 1955, and ask you if that is a photostatic copy of the letter of that date which you received from Prince, Keeler & Co., Inc.?"

"A. Yes, it is.

"Mr. Eisner: I will ask that this be marked next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 10 for identification.)"

Mr. Eisner: We offer it in evidence now as Exhibit No. 10.

The Court: So ordered.

(Letter dated September 8, 1955, Prince, Keeler & Co., Inc., to Sunset-Sternau Food Co. was marked Plaintiff's Exhibit No. 10 in evidence.) [5-A-26]

Mr. Eisner: It is on the letterhead of Prince, Keeler & Co., Inc., dated September 8, 1955, addressed to Sunset-Sternau Food Company, Modesto, California: (Whereupon Mr. Eisner read the letter into the record.)

(Deposition of Sydney Sternau.)

Mr. O'Connor: May we have a recess at this time, your Honor?

The Court: All right.

(Recess.)

The Court: You may proceed.

(Mr. Eisner continued with the reading of the deposition.)

“Mr. Eisner: Now, Mr. Sternau, this letter advises that:

‘Mr. Kaplan of American Almond Products, Co., Inc., phoned today to advise that the 2/100# bags of Apricot Kernels were received and found satisfactory with one exception—the broken Kernels far exceeded the normal tolerance.

‘We advised him that we were mailing your formal contract No. 2023 received today—however, during the discussion he advised that he had overlooked the following standard clause:

‘Merchandise Not To Exceed 5% By Weight of Broken Kernels’

and requested that we add this on our contracts and return yours for the same addition. He advised that all his [5-A-27] regular suppliers, i.e. Cal-Pak, Rosenberg insert this clause which is a recognized condition of sale for this particular item. It was not brought up before, because he assumed it would be included as a matter of course in your contract.

‘We are, therefore, returning your contract No. 2023 as enclosure and will appreciate your author-

(Deposition of Sydney Sternau.)

izing the addition of the above clause in compliance with the buyer's request.

'Awaiting your further advice in this matter.

'Yours very truly,'

Now, Mr. Sternau, after receipt of this letter, did you make any inquiry to ascertain whether a 5% limitation by weight of broken kernels was the custom and usage in dealing with this product?

"A. I think we answered in reply——

"Mr. Eisner: I asked you a question; would you read the question?

"(Record read by the Reporter.)

"The Witness: A. I don't remember.

"Q. (By Mr. Eisner): The three copies of the document which we have identified as Plaintiff's Exhibit No. 9 for identification were returned to you as enclosure with this letter of September 8, 1955?

"Mr. O'Connor: Let me put it this way: I think we [5-A-28] can agree that they must have been; they were returned—whether Mr. Sternau has any personal knowledge is again a question of fact.

"Q. (By Mr. Eisner): And when they were returned on September 8, 1955, what, if anything, did you do with them?

"A. Replied—we wrote a letter back that we couldn't comply with the——

"Mr. Eisner: Well, the letter would speak for itself.

"Q. Did you retain those three copies of Exhibit No. 9? A. Yes.

(Deposition of Sydney Sternau.)

“Q. For identification? A. Yes.

“Q. And you put them in your files of the Sunset-Sternau Food Company?

“A. I don't remember where they were put, or whether they were put in the files or not, but we kept them.

“Q. Now, Mr. Sternau, is it a fact that on about September 19, or 20, 1955, a fire occurred at the place of business at Sewell Brown and Company in Los Gatos? A. I heard it had.

“Q. Don't you know whether it had or not?

“A. I don't know the date—I know it burned up.

“Q. You know there was a fire there?

“A. I know there was a fire there, yes.

“Q. Is it a fact that a substantial portion of the apricot kernel crop of the year 1955 was destroyed in that [5-A-29] fire?

“A. I couldn't tell you—I don't know what part of the crop.

“Q. When you—and I mean the Sunset-Sternau Food Company—had you done business with the Sewell Brown Company in Los Gatos?

“A. I think about five years ago we did business with them.

“Q. Did you expect Sewell Brown & Company of Los Gatos to crack the apricot kernels that you were offering for sale to the American Almond Products Company? A. No, sir.

“Q. I show you this photostatic copy of a letter dated September 21, 1955, and ask you if you rec-

(Deposition of Sydney Sternau.)

ognize that as a letter written by you to Prince, Keeler & Co., Inc. A. Yes.

“Mr. Eisner: I will ask that this be marked for identification.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 11 for identification.)”

Mr. Eisner: We now offer it as Exhibit No. 11.

The Court: It may be admitted and marked.

(Letter September 21, 1955, Sunset-Sternau to Prince, Keeler & Co., Inc., received in evidence as Plaintiff’s Exhibit No. 11.) [5-A-30]

Mr. Eisner: It is dated September 21, 1955, Prince, Keeler & Co., Inc., 99 Hudson Street, New York, New York. (Whereupon Mr. Eisner read the letter into the record.)

(The reading of the deposition was continued as follows):

“Q. (By Mr. Eisner): In this letter, Mr. Sternau, you said:

‘We just had the packer in who was going to shell the Apricot Kernels——’

Who was the packer that you had in?

“A. Bonzi.

“Q. You referred to him as a ‘packer?’

“A. Yes.

“Q. Has he ever packed anything, that you know of?

“A. He had a shelling plant to shell these apricot kernels—we designated him as a packer because he was going to be the packer.

(Deposition of Sydney Sternau.)

‘And he advised me that he cannot guarantee 5% pieces, that they cannot be any better than the sample.’

You have stated, Mr. Sternau, that this sample was not cracked by Bonzi, but was cracked by the Continental Nut Company? A. Yes, sir.

“Q. ‘He is having a very difficult time in shelling these and would like to get out of this contract this season.’

This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels? A. Yes.

“Mr. O’Connor: I will instruct the witness that he [5-A-31] does not have to answer that question; that calls for his conclusion as to a matter of law.

“Mr. Eisner: I disagree with you, and the witness has already answered the question.

“The Witness: If that’s the way it’s going to be, let’s go to court.

“Mr. O’Connor: You just don’t answer the question—if you get any more questions of that kind, the same instruction will be given to you; the instruction here is that he is not going to answer the question because it calls for his opinion and conclusion.”

Mr. O’Connor: I at this time, if the Court please, move to strike both the question and answer on the ground that it does call for the opinion and conclusion of the witness on a matter upon which the trial court would pass whether or not there is a contract. The Court will take cognizance, I think,

(Deposition of Sydney Sternau.)

of the fact that the witness is a business man and a lay person. Whether there is a contract or is not is for the Court to determine.

Mr. Eisner: There is no question whether it is going to be a question for the determination of the Court ultimately, but the question of this letter, the witness recognizes that there is a contract and that there is a contract in existence and he refers to it as he would like to get out of this contract and he has answered the question which refers to this contract, [5-A-32] "Are you referring to the contract for the 75 tons with American Almond Products Company" and he is identifying what he referred to in the letter as this contract and that is a part of the evidence from which the Court ultimately can deduce by reason of the conduct of the parties, and whether they themselves have recognized the contract, and whether or not there has been a ratification.

It is part of the evidence in the case, if the Court please.

Mr. O'Connor: If the Court please, on the same subject the subject as to whether or not a document or series of documents are a contract is solely the province of the trial court in this case. The loose reference by a lay person is not binding upon the Court and certainly is a conclusion. As a matter of fact, it is a conclusion of law on the part of the witness, or calls for such a conclusion, and the elements of a contract, of course, assume that there is a binding agreement upon two persons; does one

(Deposition of Sydney Sternau.)

person recognize and does the other person not recognize it? Is there in fact a writing or verbal agreement capable of being enforced?

On that ground I would ask that my motion to strike both the question and answer be granted by the Court.

Mr. Eisner: If the Court please, as I stated, the reference and recognition by the defendant—by the president of the defendant, that there is a contract, and that he wanted to get out of the contract, and referring to the contract as [5-A-33] pertinent evidence. There are many cases, if the Court wanted to take the time for it, but I don't think it is necessary, where there is a question arising as to whether or not there is a ratification, whether or not there is a recognition of the contract and where the one party to the contract recognizes the contract and refers to it, that there is a contract, such conduct and such recognition, particularly in writing, is not only pertinent, it is very pertinent and material.

The Court: Let us crystalize our problem the best we can. Get the question and answer here and I will rule.

Mr. O'Connor: Line 16.

The Court: Since counsel objected to it, let us hear you.

Mr. O'Connor: The question commencing on page 24, line 14:

“Q. ‘He is having a very difficult time in shelling these and would like to get out of this contract this season.’

(Deposition of Sydney Sternau.)

"This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels?

"A. Yes."

I would like to instruct him not to answer the question. He had answered it while I was instructing him not to answer it.

Mr. Eisner: Before you instructed him.

Mr. O'Connor: I objected to it on the ground it calls for his opinion and conclusion whether——

The Court: In the interests of time, I will allow it, subject to your motion to strike. [5-A-34]

(Reading of deposition continued.)

"Q. (By Mr. Eisner): You wrote this letter yourself, didn't you? A. I don't know.

"Q. Just look at it.

"A. I don't know—and that's it.

"Q. Do you mind looking at it to see?

"A. All right, I looked at it.

"Mr. O'Connor: We will agree that he wrote it.

"The Witness: I agree that I wrote it.

"Q. (By Mr. Eisner): Where did this conversation take place with Mr. Bonzi—in your office in the office of the Sunset-Sternau Food Company?

"A. I don't remember.

"Q. I call your attention to the fact that you said 'We just had the packer in who was going to shell the apricot kernels'?

"A. I still don't remember.

"Q. Did you have a conversation with Mr. Bonzi? A. I don't remember.

(Deposition of Sydney Sternau.)

“Q. Did Mr. Bonzi tell you that he wanted to get out of the contract? A. I don’t remember.

“Mr. O’Connor: Just a minute, I am going to ask for a recess here; I want to talk to Mr. Sternau; come outside for a second.

“(Short recess.)

“Q. (By Mr. Eisner): Mr. Sternau, about September 22, 1955, [5-A-35] do you remember that Mr. Kaplan was in California, and had some telephone conversations with you personally?

“A. I don’t remember the date; I know you came down to the office——

“Q. I am not talking about that, I am speaking about a couple of days, two or three days after the fire that took place at the Sewell Brown Company. A. No, I don’t remember.

“Q. Let me refresh your recollection: I will ask you if you had a telephone conversation with Mr. Kaplan at that time, in which you told Mr. Kaplan that the delivery of the apricot kernels was delayed because of the lack of cracking facilities.

“A. I don’t remember; personally, I don’t remember.

“Q. You have no recollection of that?

“A. No recollection of that at all.

“Q. Do you remember that Mr. Kaplan told you that if you had difficulty with the cracking facilities, that he would be able to arrange cracking facilities for the Sunset-Sternau Food Company with either Rosenberg Brothers or California Packing Corporation? A. No, the only time——

(Deposition of Sydney Sternau.)

“Q. To do the cracking?

“A. The only time I remember the conversation was when he was down at Modesto with Bonzi and you; I don’t remember anything before. [5-A-36]

“Q. You don’t remember anything before that?

“A. I don’t remember that conversation with Mr. Kaplan.

“Q. Do you remember telling Mr. Kaplan that he would get full delivery and that Sunset-Sternau Food Company would not fall down on its contract?

“A. No, I don’t remember telling Mr. Kaplan that.

“Q. Do you remember that Mr. Kaplan told you that if the California Packing Corporation did the cracking, there would be no difficulty?

“A. No, I don’t remember that; I remember him telling us that——

“Q. You don’t remember any such conversation at all?

“A. No, I don’t remember any such conversation.

“Mr. O’Connor: You are referring to the telephone conversation, counsel?

“Mr. Eisner: Yes.

“Q. And do you remember that there was a second telephone conversation with Mr. Kaplan, or Mr. Kaplan called you and told you that he had arranged with Carroll Glenny of the California Packing Corporation to do the packing for you?

“A. No, I don’t remember.

“Q. You don’t remember anything of the kind?

(Deposition of Sydney Sternaud.)

“A. No.

“Q. I show you a letter dated September 28, 1955, and ask you if you recognize that as a letter received from [5-A-37] Prince, Keeler & Co., Inc?

“A. Yes.

“Mr. Eisner: I will ask that this be marked for identification.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 12 for identification.)”

Mr. Eisner: We offer it in evidence as Plaintiff’s Exhibit No. 12.

The Court: It may be admitted and marked.

(Whereupon Plaintiff’s Exhibit No. 12 for identification was admitted in evidence as Plaintiff’s Exhibit No. 12.)

Mr. Eisner: This letter is on the letterhead of Prince, Keeler & Co., Inc., dated September 28, 1955, addressed to Mr. S. M. Sternaud, Sunset-Sternau Food Company, Modesto, California. (Whereupon Mr. Eisner read the letter into the record.)

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I call your attention, Mr. Sternaud, to this letter, which is addressed to you as ‘Dear Sydney’; that is your first name?

“A. Yes.

“Q. ‘Just finished speaking with Mr. Jack Kaplan of American Almond Products, who advised me that you had agreed to the following during your discussions with him on his recent visit to California.

(Deposition of Sydney Sternau.)

'It is understood, due to the fact that you have no shelling facilities for Apricot Kernels, that it has [5-A-38] been arranged through the kindness of Mr. Carroll Glenney of Calpack that Mr. Engel (Calpak's Plant Manager) to shell the Apricot Kernels which we sold American Almond for your account.'

"Q. Does that serve to refresh your recollection that you did have such a conversation by telephone?

"A. No, sir, it does not.

"Q. 'It certainly was fortunate that Mr. Kaplan had connections in Calpack; otherwise, we would have been in a mess with this good buyer—Jack Kaplan was most cooperative in this matter.

'We will appreciate your keeping us informed concerning shipping information in this matter.

'Kindest regards.

Yours very truly,
Prince, Keeler & Co., Inc.
Alex Astrack
Alex Astrack'

Now, Mr. Sternau, after receiving this letter, did you make any reply to it? A. I don't know.

"Q. Did you make any reply in which you stated that there was no such conversation that was had by and between you and Mr. Kaplan?

"A. I don't remember.

"Q. If you replied to that letter, do you have any reply other than what has already been produced here at [5-A-39] the request for production?

"A. No, we have no more letters in our file.

"Q. Now, after receipt of that letter, Mr. Ster-

(Deposition of Sydney Sternau.)

nau, did you contact California Packing Corporation and make any arrangement to have them do the cracking of these kernels?

“A. I don’t remember.

“Q. That is the best answer you can make to that question, is it? A. Yes.

“Q. Would other men in your organization have had contact with——

“A. Maybe Hanshaw, but I don’t remember.

“Q. Now, Mr. Sternau, I am going to show you a letter dated October 12, 1955, photostatic copy of such a letter and ask you if you recognize this as a letter that you wrote? A. Yes.

“Mr. Eisner: I will ask that it be marked Plaintiff’s Exhibit for identification next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 13 for identification.)”

Mr. Eisner: We now offer the document as Exhibit No. 13, and it reads as follows——

Mr. O’Connor: May I see that, counsel? I don’t seem to have a copy of that.

Mr. Eisner: It is a letter written by Mr. Sternau, October 12th. [5-A-40]

(Letter dated October 12, 1955, Sunset-Sternau to Prince, Keeler & Co., Inc., was received in evidence as Plaintiff’s Exhibit No. 13.)

(Whereupon Mr. Eisner read the letter so marked into the record, and continued with the reading of the deposition as follows:)

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisener): I call your attention to this language in this letter, Mr. Sternau.

‘The same thing goes for the American Almond Products. They are doing us no favor in getting Calpack to shell the apricot kernels. They are doing themselves a favor because they bought them at a low price and they wanted delivery.’

Do you remember making that statement in the letter?

“A. I must have—the letter is there, written by me.

“Q. Does that refresh your recollection as to whether or not any arrangements were told you by Mr. Kaplan that had been made with the California Packing Corporation?

“A. No, it does not.

“Q. I show you a photostatic copy of a telegram dated October 21, 1955, and ask you if you recognize it as a telegram received by the Sunset-Sternau Food Company. A. Yes.

“Mr. Eisner: I will ask that this be marked exhibit next in order for identification. [5-A-41]

“(The document referred to was marked as Plaintiff’s Exhibit No. 14 for identification.)”

Mr. Eisner: We offer it in evidence, and it reads as follows:

Mr. O’Connor: If the Court please, I will object to the telegram being read, and my objection on the basis it is hearsay and assumption of something not in evidence. It contains a conclusion. A matter of the sender of the telegram, and it is not binding upon this defendant.

(Deposition of Sydney Sternau.)

Mr. Eisner: This is dated October 21, 1955, addressed to Mr. S. M. Sternau, Sunset-Sternau Food Company, Modesto.

"American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 which was confirmed by you.

Prince Keeler & Co., Inc."

Mr. O'Connor: If the Court please, I will urge the objection which I have made and I will add, Your Honor, that this is a document containing apparently the opinion and conclusion of the person not a party to the action, not binding upon this defendant. It is hearsay so far as this defendant is concerned.

Mr. Eisner: This was a communication from Prince, Keeler & Co. whom Mr. Sternau has identified as his broker and representative in New York, and which the correspondence so far, and the contracts show, handled this transaction. [5-A-42] It is a communication to the witness, that he received. His conduct respecting this and the witness has alleged that the sale was confirmed, and what he did respecting it is certainly pertinent. It is a communication directly to the witness. It is not hearsay.

It is not offered as proof of its contents. It is offered as evidence of conduct and what transpired pertaining to this transaction. It is in no sense hearsay.

Mr. O'Connor: I submit that it is strictly hearsay, if the Court please, as well as containing a con-

(Deposition of Sydney Sternau.)

clusion of the sender which is in no wise binding upon this defendant. He is a third party to the transaction.

The Court: I will rule, subject to your motion to strike and over your objections so you may have the full opportunity.

Mr. O'Connor: Reserve the motion, then, Your Honor.

The Court: Yes.

Mr. O'Connor: Thank you.

(Whereupon the telegram in question was admitted into evidence as Plaintiff's Exhibit 14.)

(Mr. Eisner continued with the reading of the deposition.)

"Q. (By Mr. Eisner): I call your attention to this telegram, which states that 'American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 which was confirmed by you.'

Did you make any reply to that telegram? [5-A-43]

"Mr. O'Connor: This is from your independent recollection, Mr. Sternau, if you have a recollection.

"A. (By the Witness): No, I have no recollection of it at all.

"Q. (By Mr. Eisner): Now, I show you a letter dated October 25, 1955, from the American Almond Products Company, and ask you if you recognize that as a letter of which you have the original?

"A. Yes.

(Deposition of Sydney Sternau.)

“Mr. Eisner: I will ask that that be marked our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 14 for identification.)”

Mr. Eisner: We now offer it as Exhibit 15, and it reads as follows: It is on the letterhead of American Almond Products Company, Inc., October 25, 1955, Mr. Sydney Sternau, Sunset-Sternau Food Co., Modesto, California:

(Whereupon Mr. Eisner read the letter into the record.)

(The letter just read was received in evidence as Plaintiff’s Exhibit No. 15.)

(Reading of the deposition continued.)

“Q. (By Mr. Eisner): I call your attention to this letter, Mr. Sternau.

‘With reference our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California we had an opportunity to talk about the matter on the phone.’ [5-A-44]

Does that refresh your recollection that you had a conversation? A. No, it does not.

“Q. This further statement is made:

‘At that time you indicated to me as result of Sewell Brown Co. loss of cracking plant by fire, you were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help.’

Is it a fact that after the fire you were attempting to accomplish your cracking with other people?

(Deposition of Sydney Sternau.)

“A. Mr. Bonzi was trying to get other people to crack them, but I don’t know who he was going to have crack them; I couldn’t tell you that; I couldn’t answer that.

“Q. Continuing on with the letter:

‘You were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help?’ A. I do not.

“Q. ‘As you know, I immediately obtained the cooperation of California Packing Corp. Mr. Carroll Glenney stated that he had arranged with Mr. Engel (Calpack’s plant manager) to accomplish the crack out for your account at some future date which would be convenient for both parties—details to be finalized between you subsequently.’

Now, Mr. Sternau, you received this letter of [5-A-54] October 25, 1955? A. Yes.

“Q. Did you make any reply to it?

“A. I don’t believe so.

“Q. I notice that this letter states. ‘Please be kind enough to give us a prompt reply.’

You have no recollection of making any reply?

“A. No.

“Q. I show you this letter of October 26, 1955, and ask you if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.,

“A. Yes.

“Mr. Eisner: We offer this as our exhibit next in order.

“(Thereupon the document referred to was

(Deposition of Sydney Sternau.)

marked as Plaintiff's Exhibit No. 16 for identification.)"

Mr. Eisner: We offer it in evidence as Exhibit No. 16.

The Court: It will be admitted and marked next in order.

(Whereupon Plaintiff's Exhibit No. 16 for identification was received in evidence as Plaintiff's Exhibit No. 16.)

Mr. Eisner: This is on the letterhead of Prince, Keeler & Co., Inc., dated October 26, 1955. (Mr. Eisner read the entire letter into the record.)

(Reading of the deposition continued.)

"Mr. Eisner: Now, I show you this letter dated October 31, 1955. A. Yes, we have it.

"Mr. Eisner: I will ask that that be marked our [5-A-46] exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 17 for identification.)"

Mr. Eisner: We offer the exhibit No. 17.

The Court: It may be admitted and marked.

(Whereupon Plaintiff's Exhibit Exhibit No. 17 for identification was received in evidence as Plaintiff's Exhibit No. 17.)

Mr. Eisner: October 31, 1955, Prince, Keeler & Co., Inc., 99 Hudson Street, New York, Attention Mr. William Berke:

(Whereupon Mr. Eisner read the letter into the record.)

(Deposition of Sydney Sternau.)

Mr. O'Connor: I notice it is 12:00 o'clock, if the Court please.

The Court: We will take an adjournment until 2:00.

(Whereupon an adjournment was taken in these proceedings until 2:00 o'clock p.m. this date.) [5-A-47]

Thursday, February 21, 1957—2:00 O'Clock P.M.

Mr. Eisner: Your Honor, at the close of the morning session we had just introduced into evidence Exhibit 17, and I shall proceed from that point on page 34, line 4.

"Q. (By Mr. Eisner): This was a letter that you personally wrote to Prince, Keeler & Co., Inc., isn't that true, Mr. Sternau? A. Yes.

"Q. Your letter? A. Yes.

"Q. I call your attention to the first paragraph: 'In reply to your letter of October 26th, wish to advise you, and you can advise American Almond Products that we are trying to get a commitment from the man with whom we are working on the Apricot Kernels. We have not written you because we have nothing to tell you. We have called this man on the telephone every day for the past ten days asking him to come to the office but he has not done so and today we are turning the matter over to Mr. O'Connor to try to get a commitment from this man. We acted in good faith and I know the buyer bought in good faith and that you sold in good faith and we are going to do everything

(Deposition of Sydney Sternau.)

possible to get this matter settled within the next ten days.'

Now, Mr. Sternau, the man from whom you were asking to get a commitment was Mr. Bonzi?

"A. Yes, sir. [5-A-48]

"Q. And the Mr. O'Connor referred to is the attorney for your Company? A. Yes.

"Q. Now, Mr. Sternau, just what were your financial arrangements with Mr. Bonzi in this matter—Mr. Bonzi as I understand it, Sunset-Sternau Food Company had a certain quantity of wet kernels itself? A. Yes.

"Q. How many tons?

"A. I think approximately 150 tons of wet kernels.

"Q. You mean kernels that had not been cracked?

"A. No, that had not been dried; after they dry them, they crack them.

"Q. They have to be dried and cracked?

"A. Yes.

"Q. And what did you do with those 150 tons?

"A. Mr. Bonzi—we delivered them to Mr. Bonzi..

"Q. You delivered, Sunset-Sternau Food Company delivered the 150 tons to Mr. Bonzi?

"A. Yes, sir.

"Q. Was Mr. Bonzi to supply another quantity of tons of apricots to be marketed? A. Yes.

"Q. How many tons of apricot kernels did Mr.

(Deposition of Sydney Sternau.)

Bonzi supply to, or agree to supply, to the Sunset-Sternau Food Company to be sold?

"A. 75 tons of kernels, including ours.

"Q. Do I understand, then, that the 75 tons that were offered to American Almond Company were all the kernels [5-A-49] that you—and when I say 'you,' I mean Sunset-Sternau Food Company—and Mr. Bonzi were going to offer for sale?

"A. That was all Mr. Bonzi offered at that time for sale.

"Q. Did he tell you that he expected to have more than Sunset-Sternau could sell?

"A. He did.

"Q. How many more tons did he expect to have for sale by the Sunset-Sternau Food Company?

"A. I couldn't tell you—I don't know the amount of apricot pits that he handles.

"Q. Was this a joint venture between Sunset-Sternau Food Company and Bonzi?"

Mr. O'Connor: If the Court please, I will object to that question as calling for the opinion and conclusion of the witness as to whether it is a joint venture between Sunset and Bonzi.

Mr. Eisner: I will withdraw that question.

The Court: It may go out.

Mr. Eisner: (Continuing with reading of deposition.)

"Q. (By Mr. Eisner): What were your arrangements with Mr. Bonzi?

"A. We were going to get a brokerage for selling them.

(Deposition of Sydney Sternau.)

“Q. Plus the price for the wet pits that were delivered to Bonzi by Sunset? A. Yes.

“Q. What brokerage were you to receive?

“A. I don’t remember; I would like to tell you, but I don’t remember.

“Q. I show you this letter dated October 31 and ask you if you recognize that as a letter written by your attorney on your behalf? A. Yes.”

Mr. O’Connor: If the Court please, I will object to the question first on the basis that asking for the letter of the attorney calls for hearsay as between these parties, and any reference to any such letter is incompetent, irrelevant and immaterial as far as the issues in this case are concerned as between the parties and the issues raised by the pleadings in this case, as to whether or not there was a written contract between the plaintiff and the defendant, and that communications of the attorney as to Bonzi would be a matter involving a confidential relationship between attorney and client, not related in any way to the question of whether it was a sale, whether there was a contract between these parties.

The Court: For the purpose of the record, indicate the purpose of the offer.

Mr. Eisner: The purpose of the offer is to show that it is a direct admission by the authorized agent of the defendant to a person who is not only the attorney and authorized, according to the testimony of the witness and the deposition, to write the letter, instructed to write the letter on his behalf, but,

(Deposition of Sydney Sternau.)

according to the record, particularly Exhibit 17, [5-A-51] he is not only the attorney but the Chairman of the Board of Directors and represents the minority stockholders of the corporation, and, if the Court please,—counsel interrupted—there is just one further question. After I asked Mr. Sternau the question, “I show you this letter dated October 31st and ask you if you recognize that as a letter written by your attorney on your behalf?”

A. “Yes,” Mr. O’Connor interrupted and said, “I wrote that for Sunset, yes.”

The law is, if the Court please, that letters written by a party or his authorized agent may constitute written admissions, and to render them admissible in evidence it is not necessary that they be sent to the party or that the letters to which they are replies shall be produced or accounted for. Attorneys or any other agents may make admissions against their client’s interest, which are admissible in evidence, when they are acting within the scope of their employment and authorization.

If the Court please, the witness himself has testified that he directed Mr. O’Connor as his attorney to write this letter on his behalf to Bonzi. Your Honor has not heard the letter. Counsel is apprehensive that it be introduced in evidence. I submit that he is not only the attorney authorized to write the letter for Sunset, but he is also the Chairman of the Board of Directors of the corporation, and as an authorized agent he certainly is authorized to make admissions [5-A-52] on behalf of his

(Deposition of Sydney Sternau.)

clients, and those admissions are admissible in evidence.

Mr. O'Connor: If the Court please, on the other hand we have a situation where the attorney acting for a party to the action in an attempt to resolve differences, may make an offer of compromise, and this is similar to that situation. In other words, if a situation can be resolved by writing to a third party involved in a transaction, and for the purpose of attempting to get him to conform to verbal commitments, in order to avoid litigation, it certainly comes within the purview of the statutes relating to compromise, relating to confidential communications between attorney and client. In this case the letter is written in that capacity and in that capacity alone, regardless of the position that the company has taken, and so forth. It certainly serves no useful purpose here. These people alleged that they have a written contract. The pleadings so specify. This has a bearing only upon a third party to the transaction.

The Court: Is the matter submitted?

Mr. Eisner: Yes.

The Court: The objection will be overruled.

(Reading of deposition continued.)

"Mr. Eisner: I will ask that this be marked as our exhibit next in order.

("Thereupon the document referred to was marked as [5-A-53] Plaintiff's Exhibit 18 for identification.)"

Mr. Eisner: We offer that as Exhibit No. 18.

(Deposition of Sydney Sternau.)

Mr. O'Connor: If the Court please, my objection will go to the introduction of the document without repetition.

The Court: The objection may be overruled. Let it be admitted and marked.

(The document referred to was thereupon received in evidence, marked Plaintiff's Exhibit 18, and read by Mr. Eisner.)

(Reading of deposition continued.)

"Q. (By Mr. Eisner): I show you this telegram and ask you if you recognize that as a telegram received from Prince, Keeler & Co., Inc.?

"A. Yes.

Mr. Eisner: I will ask that that be marked as our exhibit next in order.

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 19 for identification.)"

Mr. Eisner: We now offer that in evidence.

Mr. O'Connor: The defendant will object to the introduction of this document, if the Court please, on the ground it is hearsay. It contains matters which are incompetent, irrelevant and immaterial, and not bearing upon the issues of this case.

Mr. Eisner: We are not offering it for any purpose of proving anything that is in the telegram, but simply for what the telegram says, a notification, which it is, from Prince, [5-A-54] Keeler, the broker, the agent of the defendant, to the defendant, stating the facts. We will furthermore connect it up.

(Deposition of Sydney Sternau.)

The Court: The objection will be overruled.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 19, and read by Mr. Eisner.)

(Reading of deposition continued.)

"Q. (By Mr. Eisner): I show you a letter dated November 3, 1955, and ask you if you recognize it as a letter received by you from Prince, Keeler & Co., Inc.? A. Yes.

"Mr. Eisner: May that be marked our exhibit next in order?

"(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 20 for identification.)"

Mr. Eisner: And we offer it in evidence as such.

Mr. O'Connor: The same objection that I have made to Plaintiff's Exhibit No. 19, your Honor.

The Court: The same ruling.

(The document referred to was thereupon received in evidence, marked Plaintiff's Exhibit 20, and read by Mr. Eisner.)

"Q. (By Mr. Eisner): This letter from Prince, Keeler & Co., Inc., which has been marked No. 20 states:

'We have your letter of October 31st regarding American Almond Products' Apricot Kernels.'

Your letter of October 31st referred to is now Exhibit [5-A-55] No. 17 for identification?

"A. Yes.

"Mr. O'Connor: We will agree that that is correct.

(Deposition of Sydney Sternau.)

"Q. (By Mr. Eisner): Now I show you this letter dated November 3, 1955, from Prince, Keeler & Co., Inc.; you received that letter?

"A. Yes.

"Q. I will ask you if with this letter just identified there was enclosed the letter which I am now showing you from the American Almond Products Company to Prince, Keeler & Co., Inc.?

"A. Yes.

"Mr. Eisner: I will ask that those two letters be received as exhibits next in order, respectively.

"(Thereupon the documents referred to were marked as Plaintiff's Exhibits Nos. 21 and 22, respectively.)"

Mr. Eisner: We offer them now in evidence.

The Court: Let them be admitted and marked.

Mr. O'Connor: Same objection, if the Court please.

The Court: The same ruling.

(The documents referred to were thereupon received in evidence, marked respectively Plaintiff's Exhibits 21 and 22, and read by Mr. Eisner.)

"Q. (By Mr. Eisner): I show you this letter dated November 2, 1955, and ask you if it is a letter written by Mr. O'Connor on behalf of Sunset-Sternau Food Company. A. Yes.

"Mr. Eisner: May this be marked our exhibit next in order? [5-A-56]

(Deposition of Sydney Sternau.)

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 23 for identification.)”

Mr. Eisner: We offer it as Exhibit 23. It is a letter that you wrote under date of November 3, 1955.

Mr. O’Connor: The same objection, if the Court please, as to my letter of November 3rd as I made previously to the exhibit which is designated Plaintiff’s Exhibit 18 for purposes of the record.

The Court: The objection is overruled. It may be received.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit No. 23, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I show you a letter dated November 4, 1955, and ask you if it is a letter written by you, Mr. Sternau, to Prince, Keeler & Co., Inc.?” A. Yes.

“Q. I show you a letter dated November 4, 1955, and ask you if it is a letter written by Sunset-Sternau Food Company to Bonzi?”

“A. Yes, sir.

“Q. And the apricot kernels referred to as picked up at your plant were the 150 tons that you referred to?” A. Yes.

“Mr. Eisner: I will ask that that be marked our exhibit next in order.

“(Thereupon the documents referred to were marked as Plaintiff’s Exhibits Nos. 24 and 25, respectively, for identification.)” [5-A-57]

(Deposition of Sydney Sternau.)

Mr. Eisner: We offer them in evidence as Plaintiff's Exhibits 24 and 25.

(The documents referred to were thereupon received in evidence, marked respectively Plaintiff's Exhibits 24 and 25, and read by Mr. Eisner.)

Mr. O'Connor: I see no reason to clutter up the record with that last letter. It obviously has no bearing on this case. It refers to the return of apricot kernels that the Sunset-Sternau Food Company had turned over to Bonzi. It has nothing to do with the issues before the Court in this matter and I will submit that it is hearsay, it is incompetent, irrelevant and immaterial.

Mr. Eisner: It is one link in a chain of recognition, and it shows what was transpiring and did transpire and where the kernels went, and that they were uncracked, and that part of them were in Bonzi's possession, and in conformity with the statement made by Mr. Sternau in his correspondence and in his testimony, he was asking for the kernels back, in attempting to get delivery to American Almond Products Co.

Mr. O'Connor: I fail to see it is part of the issues here as to whether there was a contract between these two people.

The Court: For the limited purpose indicated I will allow it. The objection is overruled.

"Q. (By Mr. Eisner): I show you this letter dated November 7, 1955, and ask you if you received that as a letter [5-A-58] written by Prince,

(Deposition of Sydney Sternau.)

Keeler & Co., Inc. to Sunset-Sternau Food Company? A. Yes.

“Mr. Eisner: I will ask that this be marked as our exhibit next in order.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 26 for identification.)”

Mr. Eisner: I offer it in evidence as such.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit 26, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I show you a letter dated November 9, 1955, and ask you the same question. A. Yes.

“Mr. Eisner: May that be marked as No. 27?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 27 for identification.)”

Mr. Eisner: I offer that document in evidence.

(The document referred to was thereupon received in evidence, marked Plaintiff’s Exhibit 27, and read by Mr. Eisner.)

“Q. (By Mr. Eisner): I notice in this letter dated November 4, 1955, which is Exhibit No. 24, a letter written by you personally, you state: ‘——if there had not been a fire out there which destroyed a great deal of apricot pits, there would not have been a great demand for this merchandise——’

Is it a fact, Mr. Sternau, that after this fire there was a big demand for the apricot kernels? [5-A-59]

“A. Yes, I believe so.

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): I show you this letter which purports to be one from Mr. O'Connor dated November 11, 1955, and ask you if it is a letter that was written on behalf of Sunset-Sternau Food Company? A. Yes.

“Mr. Eisner: May this be marked our exhibit next in order?

“(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 28 for identification.)”

Mr. Eisner: I offer that document in evidence.

(The document referred to was thereupon received in evidence.)

Mr. O'Connor: The same objection, if the Court please. There again the contents of the letters speak for themselves. There is an attempt to settle the dispute without relation as to the legal question involved and whether there is a contract or not and to avoid any possible litigation. That is the purpose of the letter. It is obvious from a reading of it, and under those circumstances, it being along the nature of an attempted compromise by obtaining a third party's consent of delivery of certain merchandise, I think it inadmissible in this proceeding. It certainly does not add to or detract from either the plaintiff's case or the defendant's case in this matter before the Court, and as such my objection goes to it that it would be incompetent, irrelevant and immaterial in this controversy and not within the issues raised by the pleadings. [5-A-60]

Mr. Eisner: This is another letter, if the Court

(Deposition of Sydney Sternau.)

please, directly containing admissions by the authorized agent.

Mr. O'Connor: This is a letter not written to Bonzi but to Prince, Keeler & Company.

The Court: The objection is overruled.

(Plaintiff's Exhibit 28 was thereupon read by Mr. Eisner, after which he continued with the reading of the deposition.)

"Q. (By Mr. Eisner): Now, Mr. Sternau, on or about November 12 or 13, 1955, did Mr. Kaplan and myself call at your place of business, at the place of business of Sunset-Sternau Food Company in Modesto? A. Yes.

"Q. And were conversations held at that time pertaining to getting delivery of the apricot kernels? A. Yes, sir.

"Mr. O'Connor: What was the date, counsel?

"Mr. Eisner: November 12 or 13—it might have been the 14th—approximately that date——

"A. I don't remember exactly, but I know you were there.

"Q. (By Mr. Eisner): Did you state at that time that you would or would not make delivery of the apricot kernels?

"A. I don't believe we made any statement of that type.

"Q. Did you state that you would only make delivery if you could get the apricot kernels from Mr. Bonzi?

"A. I don't remember at all.

(Deposition of Sydney Sternau.)

“Q. Was a meeting held with Mr. Bonzi and his attorneys? [5-A-61] A. Yes, sir.

“Q. And, Mr. Sternau, in response to written interrogatories, your Interrogatory No. 56, that asked for a conversation that took place in the month of September; if you will look at Interrogatory No. 54:

‘Did Mr. Sternau have any personal conversations with Mr. Jack Kaplan in Modesto in the month of September, 1955?’, and then asked what those conversations were, in No. 56, and in answer to 56:

‘Kaplan advised that if Bonzi unable to shell that California Packing Corporation would do the shelling—Bonzi stated he would think it over—Kaplan stated market price per pound was 45 cents—Bonzi said it was approximately 30 cents per pound; on the same date later, in the office of defendant, Bonzi, Kaplan, Tarrico and Sternau present; Kaplan offered to pay more money for shelled kernels that he originally offered; defendant offered to throw 60 wet tons into the deal and waived brokerage fees—if Bonzi would make delivery—Bonzi left stating he would think it over.’

Now, I will ask you if the conversation to which you were testifying and at which the parties present to whom you referred did not take place, not in September, 1953, but in the month of November, 1955? [5-A-62]

“A. That is correct; that conversation took place in Bonzi’s attorney’s office, and again in our office

(Deposition of Sydney Sternau.)

in the afternoon; you were present in Bonzi's attorney's office.

"Q. In the month of November, 1955?

"A. Yes; I made an error on the wet tons; it is 60 tons instead of 150 tons which we owned; that was my error.

"Q. In other words, you had 60 wet tons?

"A. Yes, that was my error entirely.

"Q. In this conversation, again, did Mr. Kaplan state that the California Packing Corporation was ready to do the cracking?

"A. He told that to Mr. Bonzi in your presence.

"Q. Did he also say that as far as 5% tolerance was concerned, that the American Almond Products Company was willing to waive that condition?

"A. No, he did not say it.

"Q. You don't remember that?

"A. I don't remember—he didn't say it.

"Q. You say he offered more money?

"A. He offered more money to Mr. Bonzi; he and Mr. Bonzi in our office talked it over.

"Q. I show you this telegram and ask you if you recognize it as a telegram sent by you to Prince, Keeler & Co., Inc. A. Yes.

"Q. And I call your attention to this language: 'Had very nice talk with Kaplan who is conferring [5-A-63] with O'Connor today'—

Does that refer to a conversation that you had at that time with Mr. Kaplan in Modesto?

"A. Yes.

(Deposition of Sydney Sternau.)

“Mr. O’Connor: By the way, we never did have that conference, Mr. Eisner, with Mr. Kaplan.

“Q. (By Mr. Eisner): I show you a letter dated November 17, 1955——

May that telegram be marked——

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 29 for identification.)”

Mr. Eisner: I offer that in evidence.

The Court: It will be received.

(The telegram referred to was thereupon received in evidence, marked Plaintiff’s Exhibit No. 29, and read by Mr. Eisner.)

(Reading of the deposition was continued.)

“Q. (By Mr. Eisner): I show you a letter dated November 17, 1955, and ask you if you recognize it as a letter received from Prince, Keeler & Co., Inc.? A. Yes.

“Mr. Eisner: May that be marked exhibit next in order?

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 30 for identification.)”

Mr. Eisner: May that be marked our exhibit next in order?

(Letter of November 17, 1955, from Mr. Berke to Mr. Sternau, was thereupon received in evidence, marked Plaintiff’s Exhibit No. 30, and read by Mr. Eisner.) [5-A-64]

(Deposition of Sydney Sternau.)

“Q. (By Mr. Eisner): After these conversations in Modesto with Mr. Kaplan and with myself present, and with Mr. Bonzi and his counsel, did you receive this letter from the attorneys for Mr. Bonzi, dated November 16? A. Yes, sir.

“Mr. Eisner: I will ask that that be marked as No. 31.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 31 for identification.)”

Mr. O’Connor: If the Court please, my objection to this letter of November 16th from the attorneys for this man Bonzi to Sunset-Sternau is this. I will submit it is entirely beyond the issues raised by the pleadings, raised by the evidence submitted here thus far. It is incompetent, irrelevant and immaterial, and as far as we are concerned, it is hearsay and a self-serving declaration of the attorneys themselves.

Mr. Eisner: The witness has testified that there were these conferences with Mr. Bonzi’s attorneys and with Mr. Bonzi about getting delivery. The pertinency of this letter, if the Court please, is this, that it was not until November 16, 1955, that Mr. Bonzi through his attorneys notified Sunset-Sternau Food Company that he would not make delivery of the almond pits by reason of matters alleged in the letter. I mean, his relations with Sunset-Sternau. And it was not, as the testimony shows, until that letter was received at that time that

(Deposition of Sydney Sternau.)

Sunset-Sternau for the first time and finally refused to make delivery, and [5-A-65] this letter is one of the items, one of the links in the chain as indicative of the date that the seller made his refusal to make delivery and actually fixes the time at which damages are to be fixed if we are entitled to damages, and that is the pertinency. It is not offered for the purpose of proof of any of the controversy or hearsay between Mr. Bonzi and Sunset-Sternau, but simply for the limited purpose of fixing the situation and the time at which Sunset-Sternau was notified by his associate Bonzi that delivery would not be made, and as the record will show, at that time the information was first offered and notification given that delivery would not be made and that negotiations to get delivery were at an end.

Mr. O'Connor: The limited purpose is fine, your Honor, except counsel knows and I know a telephone conversation between the two of us occurred. I think he called me, if I am not mistaken. I told him after reviewing the file that I came to the conclusion that there was not any contract. Sunset-Sternau had tried to accommodate Prince, Keeler in New York, but as long as they were insisting on going ahead with whatever they wanted to do, there would be no delivery, and the actual notification to American that there would be no delivery under any alleged contract came directly from me to Mr. Eisner by telephone conversation, and this letter has nothing to do with that. This is a letter

(Deposition of Sydney Sternau.)

concerning any disagreements between Bonzi and Sunset-Sternau and does not contribute to this [5-A-66] controversy at all. What it does contain—and I see the obvious purpose of the attempt to put it into the record here—it is a self-serving statement by the attorneys for Bonzi that Sunset-Sternau did not live up to their obligations. The attempt is to get the record before this Court; whereas, as a matter of fact, and I think counsel will concede this, if there was any chance of making a contract in this case, it went out the window with the fire that destroyed most of the apricot kernels that were available for market on September 20, 1955, and the price of the apricot kernels throughout the United States as a result of that fire increased by almost 100%, and that was the reason, frankly, why Bonzi would not agree, and that is frankly the reason why the plaintiff in this case wanted delivery on that date. But this serves no useful purpose. This is a self-serving declaration from an attorney who represents a stranger to this action. It contributes nothing and as such I submit it is incompetent, irrelevant and immaterial, and beyond the issues and hearsay.

The Court: The Court is prepared to rule.

Mr. Eisner: Submitted, your Honor.

The Court: I will allow it in subject to a motion to strike and over the objection of counsel.

Mr. Eisner: The letter reads as follows:

(Plaintiff's Exhibit 31 was thereupon read

(Deposition of Sydney Sternau.)

by Mr. Eisner, after which reading of the deposition continued.) [5-A-67]

“Mr. Eisner: Q. And after receipt of that letter from Mr. Bonzi, did you advise American Almond Products Company that no delivery would be made by Sunset-Sternau Food Company; can you answer that question?

“A. I don’t remember.

“Mr. Eisner: Perhaps it will be stipulated by Mr. O’Connor that such a statement was made by him.

“(Discussion off the record.)

“Mr. Eisner: Such notification was delivered through Mr. O’Connor.

“Mr. O’Connor: That is correct, I think it was delivered by myself.

“Mr. Eisner: Q. I show you this letter dated November 16, 1955, and ask you if you recognize that as a letter written by you to the attorney for Mr. Bonzi? “A. Yes.

“Mr. Eisner: May that be marked.

“(Thereupon the document referred to was marked as Plaintiff’s Exhibit No. 32 for identification.)”

Mr. Eisner: We offer that document in evidence as Exhibit 32.

The Court: It will be admitted.

(Letter of November 17, 1955, from Mr. Sternau to Mr. Dean Price, was thereupon re-

(Deposition of Sydney Sternau.)

ceived in evidence, marked Plaintiff's Exhibit 32, and read by Mr. Eisner.) [5-A-68]

(The reading of the deposition continued.)

"Mr. Eisner: Q. Now, Mr. Sternau, what did Mr. Bonzi do with his 75 tons of apricot kernels?

"A. I would like to know the same question; I don't know.

"Q. Did you get back your 60 tons from Mr. Bonzi?

"A. No, and we never got paid for them.

"Q. Were these the only apricot kernels that Sunset-Sternau Food Company ever offered for sale? "A. Oh, yes.

"Q. They were the only ones? "A. Yes.

"Q. This is the only transaction which Sunset-Sternau Food Company has ever had with apricot kernels? "A. Yes, sir.

"Q. Is that true?

"A. Yes, sir, that is true."

Mr. Eisner: That is all.

The Court: We will take a recess. [5-A-69]

Mr. Eisner: Call Mr. George Wright.

GEORGE WRIGHT

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Q. (By the Court): State your name, please.

A. My name is George Wright, W-r-i-g-h-t.

Q. Where do you live?

A. San Francisco; 1865 California Street.

Q. Your business or occupation?

A. I am a food broker.

Q. How long have you been so engaged?

A. For the last nine years for myself; previous to that I was in the same type of work, but I worked for S and W.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): Mr. Wright, in the month of October, 1955, did you, at the *rest* of Mr. Jack Kaplan of the American Almond Products Company, telephone to Mr. Sidney Sternau?

A. Yes, I did.

Q. Can you tell us the exact date that you did so?

A. Yes, I can, because I wrote to Mr. Kaplan to give him the result of that telephone conversation. It was on October 28th.

Q. 1955? A. 1955.

Q. Where did you telephone from? [6]

A. I telephoned from my office at 12 Market Street to Mr. Sidney Sternau in Modesto.

Q. Now, will you tell us as nearly as you can recall, what was said in that conversation?

(Testimony of George Wright.)

A. Well, at first Sidney, Mr. Sternau, seemed rather disturbed that I would bother to call him. Wanted to know what I had to do with this business, since the deal was made in New York. I told him I didn't care where the deal was made, but that since Mr. Kaplan couldn't get any information in New York as to when he could expect shipment of his merchandise, as he had a scheduled shipment of other merchandise from other people, that he had requested me to phone and try to find out for him, and that's exactly what I was doing.

I further reminded Mr. Sternau that when Mr. Kaplan had been here a short while before, that he had made arrangements with Calpak, California Packing Company, who have a kernel-cracking plant, to help Mr. Sternau out by cracking for him the kernels that he had in the form of pits, and since the plant that he had originally intended to use had burnt down, there was some problem as to where he was going to get them cracked.

Q. Just proceed.

A. Mr. Sternau replied that before he could do anything about into Calpak, that he had to get in touch with another partner that he had on this venture, upon whose land the kernels [7] were then being dried.

I replied to him that as far as Mr. Kaplan was concerned, his deal was with Sidney Sternau, he was looking to Sidney Sternau for delivery of the merchandise. Mr. Sternau then asked me if I knew what California Packing Corporation had charged

(Testimony of George Wright.)

Homer Hamlin, who was Mayfair Packing Company. They had the same problem. They likewise were going to have their pits cracked by Gethridge, and when the fire burnt the plant down, Mr. Kaplan made arrangements for them to have them cracked at Calpak.

I told them I didn't know what Calpak had charged Homer Hamlin, nor did Mr. Kaplan and I care about it; that was no business of ours. That was strictly between him and Calpak. All that Mr. Kaplan was concerned about was getting the finished kernels.

That's about the gist of the conversation.

Mr. Eisner: That's all.

Cross Examination

Q. (By Mr. O'Connor): Who is Carl Gertridge?

A. That is Carl Gethridge.

Q. Will you spell that name?

A. G-e-t-h-r-i-d-g-e. He is the manager for Sewell Brown.

Q. The manager of the Sewell Brown plant?

A. The one that burned down.

Q. When did that plant burn down, do you know, sir? [8]

A. Some time in September, I think.

Q. Do you know the exact date?

A. No, I do not. I—no, I honestly don't know exactly when, but I believe it was some time in September.

Q. Did Mr. Kaplan tell you that they had been

(Testimony of George Wright.)

going to buy from Sewell Brown prior to the fire?

A. Mr. Kaplan told me he had bought some from Sewell Brown. We went out to see Sewell Brown; I took him out there to see what was left of it.

The thing was still smoldering when we went out there.

Q. Part of that order which he had made to Sewell Brown——

Mr. Eisner: Just a moment. We object to this as not proper cross examination. Any transaction Mr. Kaplan may have had with Sewell Brown certainly is not pertinent and is not part of anything that this witness has testified to.

He has testified to a conversation that took place between himself and Mr. Sternau. If there is anything else pertaining to that, it would be proper cross examination, but I think the cross examination would be limited to that.

Mr. O'Connor: If the Court please, this is by way of preliminary and by way of foundation in cross examining the witness.

The Court: I will allow it.

Mr. O'Connor: For the purpose of showing bias and prejudice on the part of this witness. [9]

Q. Did you talk to Mr. Kaplan when he was here in September? A. Surely.

Q. And then the first time you talked to Mr. Sternau was on October 28th?

A. I believe so.

Q. Do you do business with Mr. Kaplan?

(Testimony of George Wright.)

A. No, I do not.

Q. Do you do business with Mr. Kaplan's brother-in-law who lives in Chicago?

A. Yes, I do.

Q. And they are engaged in the same business as Mr. Kaplan, are they not?

A. That is right.

Q. That is, they make——

A. Paste products.

Q. Paste products out of these apricot kernels?

A. That is correct.

Q. And the Chicago firm is owned by a relative of Jack Kaplan, the plaintiff herein?

A. That is also correct.

Q. And you say that Mr. Sternau stated to you in that October 28th conversation that Sewell Brown, Carl Gethridge, was going to do his packing?

A. No, he did not.

Q. How did Carl Gethridge's name come up?

A. Carl Gethridge's name did not come up in the conversation between Sid Sternau and myself during the phone conversation, but Mr. Kaplan was in my office when he came here right after the fire.

Q. (By Mr. Eisner): You said that that was not said in the conversation?

A. No.

Mr. Eisner: Then it may go out by stipulation. I thought it was said in the conversation.

The Witness: No, the only reference to that was in reference to the fact that Mr. Kaplan had offered his services in securing for Mr. Sternau the

(Testimony of George Wright.)

plant facilities of California Packing Corporation in order to crack the kernels.

Q. (By Mr. O'Connor): When did Mr. Kaplan telephone you and tell you to call Sid Sternau?

A. He didn't telephone me; he wrote me a letter dated October 24th.

Q. In which he asked you to call Sid Sternau?

A. And see if I could find out when he was going to get delivery of his apricot kernels.

Q. At that time did he likewise, Mr. Wright, tell you that he had made arrangements with Calpak?

A. He made arrangements with Calpak from my office when he was here before. I was sitting right there when he called both Sid Sternau and when he called Calpak. I heard the whole [11] conversation. I thought he was very nice to do it.

Q. Did you listen to Mr. Sternau's part of the conversation?

A. No, I did not. I could hear his side of it; I could hear his side of it.

Q. You could hear Mr. Kaplan's side?

A. I could hear Mr. Kaplan's side of it, yes.

Q. Just exactly how did Carl Gethridge come into the picture? You testified on direct examination that it was Carl Gethridge of Sewell Brown. I understood your testimony to be that that reference came up in your conversation with Sid Sternau on October 28th.

A. That was a past reference when I asked Mr. Sternau if he had made any arrangements to ship

(Testimony of George Wright.)

his pits so that they could be cracked to California Packing Corporation. I asked him if he had done that or if he had done anything at all about getting in touch with California Packing Corporation, because they have their own to crack and they have to schedule these things, and certainly in order to get them cracked you got to make some arrangements.

The preliminary arrangements had been made by Mr. Kaplan, but after that it was up to Mr. Sternau to follow through.

Mr. O'Connor: I move that that be stricken, if the Court please, as not responsive to the question and as a self-serving declaration.

The Court: It may go out. [12]

Q. (By Mr. O'Connor): Who introduced the name of Carl Gethridge into this conversation?

A. I did.

Q. You did? A. Yes.

Q. What did you say to Mr. Sternau regarding Mr. Gethridge?

A. I didn't say anything to him regarding Carl Gethridge. I mentioned here the reason that Calpak came into the deal was because Carl Gethridge's plant, that of Sewell Brown, had burned down, and that is why I called to ask him if he had shipped his kernels or had made any arrangements to ship the pits to be cracked into kernels by Calpak.

Q. Who introduced Homer Hamilton's name into the conversation? A. Sydney Sternau.

(Testimony of George Wright.)

Q. Who was Homer Hamilton?

A. Homer Hamilton is connected with Mayfair Packing. They likewise had kernels that had to be cracked.

Q. In the same conversation did you try to sell Mr. Sternau some pecans or other nuts?

A. I have tried to sell Mr. Sternau some pecans, but I don't believe I tried to sell them to him in the same conversation. It is possible. We represented a pecan house account from Carlo, Georgia. Mr. Sternau does buy pecans and I have talked to him several times; in fact, I met him on the street here and he told me to call him—"Any time you have anything to offer, George, call me up."

Q. You have never done any business with him?

A. No, I never have; I have never actually sold to him.

Q. You have never sold Sunset-Sternau?

A. Not to my knowledge.

Mr. O'Connor: No further questions.

Mr. Eisner: No questions.

JACK M. KAPLAN

called as a witness on behalf of the Plaintiff;
sworn.

The Court: Your full name, please?

A. Jack M. Kaplan.

Q. Where do you live?

A. In New York City.

Q. And your business or occupation?

A. I am with American Almond Products, Incorporated—an officer of that corporation.

Q. And how long have you been so engaged?

A. Approximately ten years.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): What office do you occupy in that corporation?

A. Secretary of the corporation.

Q. Now, Mr. Kaplan, what experience have you had in buying and selling apricot kernels? [14]

A. Well, I have been buying apricot kernels in my capacity as an officer of this corporation for approximately ten years. We don't normally sell apricot kernels; we sell the finished goods, which are made of apricot kernels.

Q. Let me ask you: Just what are apricot kernels?

The Court: If you hadn't asked that, I would have asked it.

The Witness: I have samples of them here.

Mr. Eisner: Very well.

The Witness: But apricot kernels actually are

(Testimony of Jack M. Kaplan.)

a by-product; they are actually the kernels, the seed, of the apricot fruit. They come from—well, the process is probably not too important, but the pit of the fruit is first dried, then cracked, the shell is separated from the nut meat, and the result is the apricot kernel, which I have samples of here. And there are various types. I have three types here.

The Court: I have never seen one myself.

Mr. O'Connor: Have you, counsel?

Mr. Eisner: Not until this case. I saw the samples here.

Q. Now, Mr. Kaplan, you say there are different types of apricot kernels. What are these types?

A. Well, to begin with, there are various types of apricots; the fruits vary, and different varieties of cots will give a different variety of kernel. In each of these varieties, no matter what particular variety of kernel we are talking about, it contains cyanide. [15]

Q. They have to be processed?

A. A small amount of cyanide.

The Court: What do they use them for?

A. As a substitute for an almond in the confectionery and baking industry—an economical substitute.

The Court: Do they grind them?

A. That is correct. We extract the cyanide prior to shipment. Very similar to an almond in content.

The Court: I have been asked that a number

(Testimony of Jack M. Kaplan.)

of times in relation to these various nuts. I never could get any idea of the thing at all.

Q. (By Mr. Eisner): Now, Mr. Kaplan, while we are on that, you say you process these apricot kernels? A. We crack them.

Q. What do you do with them?

A. You mean in the process or after we have—well, I will answer the question this way: We receive these kernels; we remove the skin. After removal of the skin, we pulverize the nut. In the process of pulverizing we remove the cyanide, which is toxic material, then when it is practically free from cyanide and pulverized, we make a nut paste; that is to say, we take the pulverized meat and combine it with sugar, which acts as a kind of a preservative, as well as flavoring agent, and it is called paste,—in this case, from this product called a kernel paste. This is our finished goods. We sell that [16] kernel paste. It in turn is sold to bakers or confectioners. They consider it a raw material for further use in their finished goods process, and a filler for making macaroon cookies.

Q. In other words, the macaroon cookies that are sold are made generally from a paste of this kind?

A. That is correct. You can make a macaroon cookie from a kernel paste, similarly, you can make one from an almond paste. This is an economical substitute for an almond. We make macaroons with it.

Q. And it is generally used by the baking trade?

(Testimony of Jack M. Kaplan.)

A. That is correct, as well as the confectionery trade.

Q. Now, Mr. Kaplan, you stated, going back, that there are different classes. Is one class of kernels what is known as a regular apricot kernel?

A. Yes, that is right.

Q. Would you tell us what is the regular apricot kernel?

A. It is the kernel derived from the process of drying apricots. In the process of drying cots the pits are removed; these pits in turn are dried, cracked, to separate the nut meat from the shell, and the regular apricot kernel is basically one which is derived from the drying process of the fruit.

Q. Is another class of kernels known as the steamed kernel?

A. Yes, there is the steamed kernel, as well; in addition, there is a sulphured kernel. [17]

Q. What is the steamed kernel?

A. The steamed kernel, basically—it may also be referred to as a juice kernel; either terminology is applicable—is one which is derived, and here again basically, from a canning process, where the fruit has been cooked, such as to make pulp or to make juice, or to make, let's say, cooked apricots which are canned. The pit which is received from this process has been exposed to hot steam; the kernel has been modified slightly; that is, it contains less fats than one which would come from the drying process previously described. This kernel is referred to as a steamed kernel.

(Testimony of Jack M. Kaplan.)

Q. In other words, as I understand, then, the apricots themselves from which the pits have been derived, have been cooked; is that correct?

A. Basically correct.

Q. And the fruit and the pit have been subjected to heat? A. Correct.

Q. And they are called then steamed kernels; is that correct?

A. Steamed or juice kernels.

Q. Do they sell generally at lower prices than the regular apricot kernels? A. Yes.

Q. Then you mentioned a third class, sulphured kernels. What are they?

A. This is a kernel which is essentially derived from a process where, in drying the cot, the cot has been cut in half, [18] has been exposed to sulphur, both the fruit and the pit; that is to say the pit, the kernel in the pit has been exposed to sulphur, and such exposure has modified the quality of the kernel to a degree where it has less value and less use to us, similar to that of the steamed kernel case where the characteristic of the kernel has been modified due to heat, in this case, due to sulphur.

Q. In other words, the regular kernel is one that you might say is a natural kernel where the pit has not been subjected to heat or sulphur; is that correct? A. That is correct.

The Court: Why do they sulphur the apricots?

A. I don't know the answer to that, your Honor. I have no idea, but I do know that they use sul-

(Testimony of Jack M. Kaplan.)

phur in this process and we do know that the kernel itself——

The Court: Well, the kernel is out before they do that?

A. Not in this case, because, as I understand it, similar to the case of a certain variety of peach—I think it is the Blenheim peach—where in cutting the peach in half for canning, they cut not only the fruit, but they cut right through the kernel.

Q. (By Mr. Eisner): Through the pit, you mean?

A. Through the pit and the kernel in the pit. Then you have the same situation here in the sulphured cots; they cut through the fruit, the cot, cut it in half. In the process they cut [19] through the pit, so you have a fully halved apricot.

The Court: That is in apricots?

A. That is correct. Now, I wouldn't say—I wouldn't pursue this to the point of saying that I am an expert in this particular angle of the fruit end of it.

The Court: You want to be careful; I am a farmer.

The Witness: But it is my understanding specifically that the kernel itself—the kernel is where I am concerned—the kernel itself has been exposed to sulphur.

The Court: Well, that is after the pit is out of it.

The Witness: It is possible, but there again, as

(Testimony of Jack M. Kaplan.)

far as I am concerned, I am primarily concerned—maybe I should say entirely concerned—with the property of the kernel rather than the fruit, and that is where I can say that in my experience the kernel contains a certain amount of sulphur.

The Court: That has no relation here in relation to the merits of this case?

Mr. Eisner: No.

The Court: All right; proceed.

Q. (By Mr. Eisner): Mr. Kaplan, is the American Almond Products Company one of the large buyers of apricot pits, of apricot kernels?

A. To the best of my knowledge, it is the single largest buyer of this product in the USA.

The Court: That is all you have to do, is to look at the [20] witness here who indicates clearly that it is a prosperous business.

Q. (By Mr. Eisner): Mr. Kaplan, in July, 1955, did you have a conversation with Mr. Sternau of the Sunset-Sternau Food Company pertaining to apricot kernels? A. Yes, I did.

Q. Where did that conversation take place?

A. It took place in our plant in Brooklyn, and I think he had with him Mr. Astrack, who is the salesman for his broker, Prince, Keeler.

Q. And the conversation took place then, when you three were present, Mr. Sternau, Mr. Astrack and yourself? A. That is correct.

Q. Will you state as nearly as you can recall what was said in that conversation?

A. Mr. Sternau said that he would have approx-

(Testimony of Jack M. Kaplan.)

imately 75 tons of apricot kernels, and he had a small sample—a very small sample, probably several ounces at most—with him, which he had shown me, of such regular apricot kernels. He indicated that he had no price at the moment upon my questioning, but that since the market for the new crop would normally open some time within 30 or 40 days, he expected to have a price at such time.

I told him I would be very interested in getting his offer at the price when it was available, and that, further, [21] since I had never purchased apricot kernels from him prior to this time, that I would be interested in getting a type sample of about 200 pounds so that I could run a production test on this material in my plant to determine the type of nut meat that he had to offer in this regular apricot kernel transaction.

Q. Do regular apricot kernels vary in size, appearance and texture?

A. They definitely do. We have had many shipments from the most—probably the largest shippers—the largest, not probably; the largest shippers of this material in California, and in many instances we observe a great variety as to the characteristics of the regular apricot kernels, and that is why I asked Mr. Sternau to send me a 200-pound type sample shipment for determination as to the quality of the nut meats he had in mind to offer me.

Q. Did you look at the small sample that Mr. Sternau had with him and showed you at that time?

A. I did.

(Testimony of Jack M. Kaplan.)

Q. And how did the appearance of the small sample look?

A. It looked very, very good. It was very regular in appearance and in color and in size, and I might say at this point normal with reference to size, and I said it did not contain any noticeable amount of broken.

Mr. Eisner: Now, then, you have identified these. I think we might just as well offer these in evidence at this time, these samples. [22]

There is one sample here that is marked as sulphured kernels. Is that a sample of what you have referred to as kernels that have been in contact with sulphur?

A. That is correct.

Mr. O'Connor: May I see those, counsel?

Mr. Eisner: Certainly.

Q. By the way, these samples have been supplied you by Rosenberg Bros. and Company?

A. That is correct; they were mailed to your office at my request.

Mr. Eisner: And we will have them further identified, I will say to the Court.

We will ask that this be marked exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 33 admitted and filed in evidence.

(Thereupon the sample of apricot kernels

(Testimony of Jack M. Kaplan.)

referred to was marked Plaintiff's Exhibit No. 33 in evidence.)

Q. (By Mr. Eisner): I notice, Mr. Kaplan, that you have a carton here labeled "juice kernels." Are these kernels a sample of what you have referred to as steamed or juice kernels?

A. That is correct.

Q. And I show you another carton which is marked "regular kernels," and ask you if these are a sample of what are referred [23] to by you as regular kernels? A. That is correct.

Mr. Eisner: We offer these in evidence as next in order.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff's Exhibits 34 and 35 admitted and filed in evidence.

(The samples of apricot kernels were marked Plaintiff's Exhibits Nos. 34 and 35 respectively in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, after you had this conversation with Mr. Sternau to which you testified, what next occurred pertaining to this transaction in apricot kernels?

A. Well, I would say about a week later—I had no notice from either Mr. Sternau or his New York representative, that the 200 pounds I had requested were in transit to me, and I was anxious to get them, so I called Prince-Keeler; I spoke to one of the men of Prince-Keeler, and asked for some information as to whether the 200 pounds were going to be shipped to me; if so, when were they go-

(Testimony of Jack M. Kaplan.)

ing to be shipped to me, and I would say that I didn't hear anything further on this thing until approximately one month later. And I know it was about a month later, because around the end of August of 1955, it was the normal time for us to begin to make our purchases of that crop's apricot kernels, and I had made some purchases about the last week of August other than from Mr. Sternau, and [24] I had been reminded of the fact that I was still waiting for the 200-pound sample to consider a possible offer from Sunset-Sternau Company. So that at that time I called Prince-Keeler again—and that was at the end of August—and asked for some information as to the status of the 200-pound sample.

Q. Had any price been announced by sellers of apricot kernels at that time?

A. Yes. As I said, that was about the end of August, and as I have said, I had made some purchases. I actually purchased from California Packing Corporation; I had purchased under two separate transactions the latter part of August a total of about three cars of 35 tons each at $17\frac{1}{2}$. And I notified Prince-Keeler that I had made some purchases of new crop kernels. As a buyer, I indicated to him that I thought the market was about 17 cents, but actually I had purchased at $17\frac{1}{2}$, and asked for any prospective offerings at such 17-cent price.

Q. That was about the first of September, 1955?

A. I would say it was a little earlier than the

(Testimony of Jack M. Kaplan.)

first, because I have a record of having received a sold note dated the first, and undoubtedly I had indicated a possibility of doing business at 17. And subsequently I was notified by Prince-Keeler that they had received a direct offer; that is to say, they were giving me a firm offer for Sunset-Sternau of approximately 75 tons of regular apricot kernels at a price of $17\frac{1}{2}$, which [25] I accepted at $17\frac{1}{2}$; and I indicated that, since I had not yet received the 200-pound type sample, which was allegedly in transit to me, this transaction would be subject to my acceptance of the sample upon arrival for approval of the nut meat quality type. And I duly received an acknowledgment in that I had gotten a sold note, or, in my case, it would be a bought note copy, dated September 1st, confirming this transaction.

Q. This is the original bought note that you received from Prince-Keeler and Company?

A. That's correct.

The Court: What was the high price that nut season?

A. Well, that crop year it went up to 43 cents.

The Court: It only indicates you are a good buyer.

The Witness: It was a very unusual circumstance.

Mr. O'Connor: A fire destroyed most of the available crop in the United States.

The Court: In the plant?

Mr. O'Connor: In a plant down in San Jose.

(Testimony of Jack M. Kaplan.)

The Court: About what stock did they have?

Mr. O'Connor: Hundreds of thousands of tons.

Mr. Eisner: They were the large producer of this commodity, Sewell Brown.

The Witness: They were not only a large producer, but they also did a lot of cracking of other parties' pits as a [26] processor, and there was a great deal of that in the fire, as well as their own material.

Mr. Eisner: We offer this bought note in evidence as Plaintiff's exhibit next in order.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 36 admitted and filed in evidence.

(The bought note referred to was marked Plaintiff's Exhibit No. 36 in evidence.)

Mr. Eisner: And this bought note is identical with the sold note that has already been read into the record.

The Court: It is already in?

Mr. Eisner: I say this is a bought note and it is identical with the sold note that was delivered by the broker. In other words, the broker delivered a bought note to the buyer and a sold note to the seller, and the two are identical with the exception that one is called a bought note and the other a sold note. It is a broker's memorandum.

Q. And did you retain this bought note, Mr. Kaplan?

A. I certainly did. It was of extreme importance to me to keep an excellent record of all such

(Testimony of Jack M. Kaplan.)

memorandums, and we had of course a quantity of similar ones from other parties.

Q. You stated that at the same time, at the end of August, this same time, you bought at the same price, 17½ cents, regular apricot kernels from others? [27] A. That is correct.

Q. Do you have the contracts there?

A. Yes, I do. Here is one for 140,000 pounds; here is one for 70,000 pounds dated that last week of August; two separate transactions at different dates.

Mr. Eisner: We are going to offer these in evidence, and I will state to the Court the purpose for which I am offering them. These are contracts at exactly the same price for exactly the same commodity, regular apricot kernels, that this contract was given for, and these contracts show upon their face that the percentage of broken kernels were not to exceed five per cent, showing it is a custom of the trade, the purpose being to show that the American Almond Products Company was purchasing at the same price, for 17½ cents, the same product from the Sunset-Sternau Food Company. That is the purpose of the order.

The Court: Let them be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 37 admitted and filed in evidence.

(The contracts referred to were marked Plaintiff's Exhibit No. 37 in evidence.)

(Testimony of Jack M. Kaplan.)

Q. (By Mr. Eisner): After the receipt of this bought note, did you receive the two bags or the 200-pound sample that you had asked for?

A. Yes, I would say about one week later actually we did [28] receive two 100-pound bags, and as was our intent, we actually put one bag into a production test; that is to say, we made kernel paste of this material, as I previously described, kernel paste, and, further, we took the kernel paste and made macaroon cookies of the paste.

That was important to us because, in addition to looking at the raw material and examining them superficially for many characteristics we were interested in, we wanted to run this production test, because we find that one of the critical methods of determining nut-meat quality of a kernel is to make a macaroon; that is to say, if we have a poor grade kernel, the macaroon will not rise properly, or it will not have a proper color; it will run; it will lack shape.

And we have had many cases of experience in the past where we made kernel paste of poor quality regular apricot kernels where we had a great deal of difficulty. So that we learned from our own past experience that where we were in the slightest way doubtful about the quality of a regular kernel, to run this critical bake test to determine the type of regular kernel nut meat.

Q. And you did that in this instance?

A. We did so.

(Testimony of Jack M. Kaplan.)

Q. What was the result of your test and your examination of the quality of the 200-pound sample?

A. We found that the regular apricot kernels in this sample [29] were perfectly good.

I accordingly called Prince-Keeler and notified them that we accepted the sample from the point of view of type of kernel nut meat; however, we did notice that in this two-bag sample that there was an excess of five per cent broken kernels. I would say at this time that possibly there was a percentage of seven per cent or eight per cent maximum. At this point we didn't measure it, because we didn't feel it was very pertinent, since it was uniformly the practice of the trade, for 25 years or more than I know of, and certainly for ten years that I had direct knowledge of this matter, that regular apricot kernels by uniform practice never had more than five per cent by weight of broken kernels and/or shells.

So that I merely informed Prince-Keeler—one of the men there; it may have been Frank Sullivan—that I accepted the sample to be good type nut meat, but I cautioned him to be advised of the fact that the normal practice of maximum percentage broken was five per cent, and that, since in many cases this implied understood warranty was actually stipulated on contracts—it was a fluid, flexible matter, but since in many cases it was specified on contracts, that I would prefer in this matter that it be similarly stipulated, since this was the first

(Testimony of Jack M. Kaplan.)

time I had purchased from this seller, and I wanted no confusion about this matter.

Q. In this same conversation did Mr. Berke tell you that they [30] had received the forms of formal contracts from Sunset-Sternau?

A. Yes, they did. I had received a letter—actually a copy of a letter—dated September the 8th from Prince-Keeler Company signed by Mr. Sullivan to Sunset-Sternau dated the 8th, and because during this conversation I have just described, Mr. Sullivan indicated to me that he had just received that day from the principals, Sunset-Sternau Company, copies of the more formal contract applying to the 75-ton kernel transaction, and that since I had requested that they make specific mention of five per cent broken, then he would accordingly return the more formal contract to the maker for such insertion.

And accordingly, I had received from his office, a copy of the letter transmitting those contracts to the seller for the purpose.

Q. What date is that letter?

A. That is September 8, 1955.

Q. And that is Plaintiff's Exhibit No. 10 in evidence. All right. So you received a copy of Plaintiff's Exhibit No. 10 in evidence from Prince-Keeler and Company?

A. That is correct.

Q. You referred to this trade custom. You said that trade custom has existed in connection with regular apricot kernels as long as you have been

(Testimony of Jack M. Kaplan.)

engaged in business? A. That's correct.

Mr. O'Connor: Just a minute, if the Court please.

This is the plaintiff's direct case. However, as I understand the law, trade custom and usage, testimony of trade custom and usage depends for its admission upon a knowledge of that trade custom and usage by all parties to a contract. And I would ask in this type of procedure—so that I won't have to object to it as it goes along and interrupt counsel and take the time of the Court—that all testimony regarding trade custom and usage, so far as the plaintiff's case is concerned, be subject to a motion to strike upon a showing or upon any evidence or proof that trade custom and usage was not understood or known to all parties to this particular transaction to which they are attempting to attach it.

Mr. Eisner: Have you finished, counsel?

Mr. O'Connor: Yes, with this one further statement. I may state this, if the Court please: It has already preliminarily appeared in the examination of this witness that he knew that Sunset-Sternau, through his conversation with Mr. Sternau, had not engaged previously in the sale of this particular item and were not accustomed to selling this particular item, had no experience, and therefore I would conclude that he had no knowledge of the trade custom or usage.

Mr. Eisner: I am sorry to say that counsel has an incorrect understanding of the law; that when one deals in a commodity in which a general cus-

(Testimony of Jack M. Kaplan.)

tom exists, whether he knows the custom or he doesn't know the custom, he is bound by the custom, [32] and he is conclusively deemed to know the custom when he engaged in this transaction in this commodity, whether he is familiar with it or not. When the time comes, if it ever becomes pertinent to that, I have the authorities here.

The Court: So that both parties will be protected, let the testimony go in, subject to a motion to strike.

Mr. O'Connor: Very well, your Honor.

Q. (By Mr. Eisner): I think you have testified to what the trade custom is, Mr. Kaplan, so I won't press that.

I will ask you this question: Do broken kernels have a less market value than whole kernels?

A. To my knowledge, considerably less. And, as a matter of fact, I can only say to my knowledge, because we never buy broken kernels; but I understand that they are normally sold for oil crushing purposes at a fraction of the value of regular kernels.

Q. Do broken kernels meet with the requirements of your business?

A. Absolutely not.

Q. Will you explain to the Court the reason for that—you stated that you make the kernels into paste—so the Court will understand why you cannot use broken kernels in manufacturing the kernels into paste?

A. Well, as I have indicated, the process basic-

(Testimony of Jack M. Kaplan.)

ally is one of removal of skin, then pulverizing, in normal procedure. [33] Now, in the removal of the skin——

The Court: Of the meat itself?

A. That is correct. In the removal of skin, the process employed is one, first, where we water soak the nut meat to loosen the skin from the nut meat and dissolve the gums; secondly, the water moist kernels are then put through a friction device where by friction the skins are slipped from the nut meat. After this has happened, the material drops through a duct, which is subjected to an air blast. This air blast is strong enough to throw out or reject the skin but not strong enough to throw out the nut meat.

Now, you can readily see that if we had a great deal of broken or small pieces of kernels in this procedure, the small kernels would be similar in weight to the skin; that is, they would be much lighter than the larger regular size, and they similarly would be thrown out with the refuse, so that it is a costly matter for us to consider, from any point of view, using any broken kernels. And that is why it is of great significance to us, as it is to the rest of the trade, for the same reason, and that's why they go at a discount.

Q. What next occurred in this transaction after you advised Prince-Keeler and Company of your approval of the sample?

A. Well, normally—and this had been the case in 1955 with many transactions I had with Prince-

(Testimony of Jack M. Kaplan.)

Keeler—normally a week or two or even longer goes by between the time we make [34] some confirmation of a transaction and we get a formal contract for execution. This is in the height of the buying and selling season. I am very busy; the broker is very busy; so that a week or more or two weeks would go by between such a transaction and its formal confirmation.

In this case about a week or more had gone by, and prior to receiving such formalization of this matter, a fire occurred. As I remember it, it was a Sunday. I heard about it Monday morning—Monday morning, the 19th of September. A fire had occurred in Los Gatos at the Sewell Brown plant, as I have previously described.

When I heard about this fire, I was immediately alerted to various obvious possibilities: number one, what percentage of the crop had been burned. I had not covered for my entire year's requirements. What possibility would there be that I would *no* sufficient quantity left after a fire to cover properly? What would happen to the price of this remainder?

I found it extremely important to go to the location of the fire and to determine at first hand the consequences of this situation. In addition to which, I had contracts for this material from, among other people, California Packing at this date—no, not California Packing — in addition to California Packing, at this date, from Mayfair Packing, who normally would have his pits cracked at the Sewell

(Testimony of Jack M. Kaplan.)

Brown plant, as well as pits contracted from Sewell Brown Company, [35] and I was most anxious to determine the status of the pits I had contracted with these people, in addition to the other considerations.

Q. By "most of these people," whom do you mean?

A. Sewell Brown Company, Mayfair Packing, as well as additional possible purchases to be made. So that I immediately made arrangements to come to the site of the fire, and I did so arrive here about September 21st or 22nd, something like that.

Q. In other words, you came from New York?

A. I came from New York.

Q. To California, about September 21st?

A. That's correct.

Q. While you were here in California, did you receive a telephone message from Prince-Keeler and Company?

A. Yes, I had already been here a day or so——

Mr. O'Connor: Just a moment, if the Court please, I will submit the question calls for obvious hearsay, a telephone conversation with Prince-Keeler and Company.

Mr. Eisner: It isn't hearsay at all.

The Witness: I have confirmation of it in writing, for that matter.

Mr. Eisner: Just a moment, Mr. Kaplan.

It isn't hearsay at all. When you hear it, you will find out it was a request by Prince-Keeler and Company to Mr. Kaplan, [36] that he get in touch

(Testimony of Jack M. Kaplan.)

with Mr. Sternau and see if he could help Mr. Sternau out in getting his apricot pits cracked.

Mr. O'Connor: Do you want to testify, counsel?

Mr. Eisner: No.

Mr. O'Connor: I will submit my objection, if the Court please, it is hearsay. It is telephone conversation between this man and another party not in the presence of the defendant or any representative of the defendant.

The Court: I will allow it in subject to your motion to strike and over your objection. Unless it is connected up, I will grant your motion.

Q. (By Mr. Eisner): Mr. Kaplan, did you have such a telephone conversation?

A. I'm sorry; would you repeat that question?

Q. Did you have such a telephone conversation?

A. With whom? The original question again?

Q. With Prince-Keeler and Company?

A. Yes, I did.

Q. Were you in San Francisco?

A. I was in George Wright's office at the time the message was given to me by Mr. George Wright's secretary. The call had been received in his office for me. Apparently Prince-Keeler had tried to locate me; they called my office; they were informed to contact me through Mr. Wright's office.

Q. Did you contact Prince-Keeler and Company on the phone? [37] A. Yes, I did.

Q. All right. Did you have a telephone conversation? A. I did.

Q. What was the telephone conversation?

(Testimony of Jack M. Kaplan.)

A. I spoke to Mr. William Berke.

Mr. O'Connor: Just a minute. If the Court please, apparently this witness is reading from notes that he has before him. If he is reading from notes, I want to look at the notes. I think I am entitled to see those notes.

Mr. Eisner: He is not reading from notes; he has a letter there.

Mr. O'Connor: I am certain he is reading something up here, counsel. I have a right to look at them. He is refreshing his memory.

The Witness: You can have the whole file (handing papers to counsel).

Q. (By Mr. O'Connor): Are you testifying from these letters, Mr. Kaplan?

A. No, sir. I am using the letters to refresh my memory of events which occurred in 1955.

Q. (By Mr. Eisner): Mr. Kaplan, will you testify—tell us what the telephone conversation was, as nearly as you recall?

A. Mr. Berke advised me that he had received a letter from Mr. Sternau and that he wanted me to listen to him read the letter verbatim word for word, and he then so read the letter [38] to me over the phone. He thought it was important enough for me to know about this letter, particularly since I was in California, and possibly I might be able to react to the information to the benefit of all concerned; and he further indicated that he would send a copy of this letter he had received to my office upon my request. I thought

(Testimony of Jack M. Kaplan.)

it was important enough, and I requested him to confirm this telephone conversation by writing my office of the nature of this conversation, and quoting the letter he had received. I thought it was that significant.

Q. Did you thereafter receive a letter at your office from Prince-Keeler and Company?

A. Yes, I did.

Q. Is this it?

A. This is the correspondence.

Mr. Eisner: You have seen it, counsel. Would you want to see it again?

Mr. O'Connor: I haven't read it.

Mr. Eisner: We offer this letter in evidence as Plaintiff's Exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 38 admitted and filed in evidence.

(Letter, Prince-Keeler to American Almond Products dated September 23, 1955, marked Plaintiff's Exhibit No. 38 in evidence.) [39]

Mr. Eisner: I will read this letter. It is dated September 23, 1955, on the letterhead of Prince-Keeler and Company (reading exhibit).

And annexed to this letter is a letter dated September 21st from S. M. Sternau, which is Plaintiff's Exhibit No. 11 in evidence.

Mr. O'Connor: I notice it is five minutes past four. Does your Honor wish to take an adjournment until Monday? I am in this position: I have

a sale of property in an estate set for 4:30 o'clock this afternoon.

The Court: Today?

Mr. O'Connor: Yes.

The Court: We will take an adjournment until Monday morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Monday, February 25, 1957, at 10:00 o'clock a.m.) [40]

Monday, February 25, 1957—10:00 A.M.

The Clerk: American Almond Products Company versus Sunset-Sternau Food Company, further trial.

JACK M. KAPLAN

a witness called by and on behalf of the Plaintiff, resumed the stand and testified further as follows:

The Clerk: Jack M. Kaplan to the stand, heretofore sworn.

Direct Examination—(Continued)

Q. (By Mr. Eisner): Mr. Kaplan, I believe at the time of adjournment I was just about to ask you regarding a telephone conversation that you had with Mr. Sternau at the Sunset-Sternau Food Company when you were in San Francisco in the month of September, 1955; is that correct?

A. That is correct.

Q. Mr. Kaplan, did you have such a telephone conversation with Mr. Sternau? A. I did.

The Court: Who is Mr. Sternau? Identify him.

Mr. Eisner: Mr. Sternau is a defendant, if the

(Testimony of Jack M. Kaplan.)

Court please, as is Sunset-Sternau Food Company, and Mr. Sternau is President of it.

The Court: All right; proceed.

Q. (By Mr. Eisner): Where were you, Mr. Kaplan, when you telephoned to Mr. Sternau? [41]

A. I was in San Francisco, in the office of Mr. George Wright.

Q. And when did that conversation take place?

A. That took place September the 23rd. I have a letter confirming the date.

Q. September 23rd, 1955? A. 1955.

Q. Will you state as nearly as you can recall the substance of that conversation?

A. I called Mr. Sternau, advised him that I had received a telephone call from New York from Prince-Keeler and that they had read his letter to me, and that at Mr. Berke's suggestion I was speaking with him now to see what possibly could be done.

Mr. Sternau said to me, that, as a result of the fire at the Sewell Brown plant, he was having difficulty cracking the kernels—his kernels.

I said to him that I was in California at the moment because I had purchased kernels from Sewell Brown Company and Mayfair Packing Company and the California Prune and Apricot Association; in each of these cases there were some of these kernels which I had purchased, possibly directly or indirectly, involved in the fire, and that I had been making attempts to clarify that situation and I possibly could help him with his problem;

(Testimony of Jack M. Kaplan.)

that undoubtedly I could get the cooperation of California Packing Company or Rosenberg Bros. and Company in cracking any kernels that he had uncracked, and I [42] asked him if that would be of some help to him. And he said well, he would appreciate it very much. He indicated that he would be very appreciative if I could arrange that for him. I said I would try it; I would notify him after I had spoken to these parties.

I then called——

Q. That was the substance of that conversation?

A. Of that particular conversation.

Q. After that conversation did you get in touch with California Packing Corporation?

A. I did.

Q. What did you do in that respect?

Mr. O'Connor: Just a minute. If the Court please, I submit that if this is going to involve the conversation of third parties, that it will be hearsay.

Mr. Eisner: We are not trying to prove any fact by this conversation; we are just seeking to show that the witness did telephone or make arrangements with California Packing Corporation, and I will follow that with another telephone conversation to Mr. Sternau. We are not trying to prove any fact by the conversation.

The Court: Very well. I will allow it.

A. I did. I spoke to Mr. Glenny—Mr. Carroll Glenny, who was the sales manager of California

(Testimony of Jack M. Kaplan.)

Packing Company. I said to Mr. Glenny that I would like—— [43]

Mr. O'Connor: The objection goes to this telephone conversation. It calls for hearsay.

The Court: What he said would be hearsay clearly.

Mr. Eisner: We are not trying to prove any fact by it, if the Court please.

Mr. O'Connor: Well——

Mr. Eisner: I won't press it.

Q. You did have a telephone conversation with Mr. Carroll Glenny of the California Packing Company?

A. Yes, and I sent him a letter subsequently concerning that conversation.

Q. Thereafter, after having that telephone conversation with Mr. Carroll Glenny of the California Packing Corporation, did you have another telephone conversation with Mr. Sternau?

A. I did.

Q. All right. How long after the first telephone conversation with Mr. Sternau to which you have testified, did you have this second telephone conversation with Mr. Sternau?

A. I would estimate that it was within the hour——within an hour's time.

Q. Did you call Mr. Sternau again on the telephone? A. I did.

Q. And would you now state the substance of the conversation that you had with Mr. Sternau on this second occasion?

(Testimony of Jack M. Kaplan.)

A. I told Mr. Sternau that I had gotten the co-operation of the [44] California Packing Corporation insofar that they would be glad to crack the pits for Mr. Sternau at a toll charge and labor charge, which they would finalize after conferring with Mr. Sternau; that it would be done at some later period; that he requested—Mr. Glenney requested that Mr. Sternau contact his plant manager, Mr. Engell, to finalize the charge and the date of this crack out.

Mr. Sternau indicated to me that he was very *appreciate* of this and he assured me that I would get delivery of the kernels subsequent to the processing and the crack out.

Q. That was the substance of that conversation?

A. That is correct.

Q. Did you then shortly thereafter return to New York? A. I did.

Q. And when you returned to New York did you make any report to Prince-Keeler and Company pertaining to the conversations that you had had with Mr. Sternau?

A. I did. I spoke to Mr. Berke and Mr. Astrack of that office and described the conversations and the arrangements we had arrived at as previously described.

Mr. O'Connor: Just a moment. If the Court please, I had assumed that he would confine his answer to the question asked. I move to strike out the latter part of the conversation as to any conversations he had with Prince-Keller and Company

(Testimony of Jack M. Kaplan.)

in New York, as being hearsay and not binding upon the defendant. [45]

Mr. Eisner: Prince-Keller and Company, if the Court please, was the agent through whom the sale was negotiated, and furthermore, it is really preliminary because I am just about now to refer to a letter that Prince-Keeler and Company wrote him.

The Court: Go directly to the letter. Sustain the objection.

Mr. O'Connor: The statement of counsel that Prince-Keeler of New York is an agent of Sunset-Sternau is a gratuitous statement of counsel, of course, your Honor. Whether they are, or are an agent of American Almond Products, the plaintiff, will have to be determined by the Court from the evidence before it.

Mr. Eisner: The evidence is here in the record.

The Court: There is nothing before me. You may proceed.

Q. (By Mr. Eisner): Mr. Kaplan, did you thereafter receive from Prince-Keeler and Company a copy of a letter which Prince-Keeler and Company had written to Sunset-Sternau pertaining to the arrangements made by you?

A. Yes, I did. I have such copy dated September 28, which was forwarded to my office and marked for my attention.

Mr. O'Connor: I have a copy.

Mr. Eisner: You have that. The original of this letter is already in evidence, but I am going to

(Testimony of Jack M. Kaplan.)

introduce this copy [46] because it is the copy that this witness received.

Mr. O'Connor: I will stipulate that it doesn't have to be introduced; counsel can use the original, which is Plaintiff's Exhibit No. 12, so the record will not be confused.

Mr. Eisner: All right.

The Court: That is sufficient for all purposes.

Mr. Eisner: Very well, I will just refer to this letter then. It is Plaintiff's Exhibit No. 12 in evidence, and this letter just states, if the Court please:

"Just finished speaking to Mr. Jack Kaplan of American Almond Products Company, who advised me that you had agreed to the following during your discussion with him on his recent visit to California:

"It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged through the kindness of Mr. Carroll Glenney of Calpak, for Mr. Engell, Calpak's plant manager, to shell the apricot kernels which we sold American Almond for your account.'

"It certainly was fortunate that Mr. Kaplan has connections in Calpak; otherwise we would have been in a mess with this good buyer. Jack Kaplan was most cooperative in this matter.

"We will appreciate your keeping us informed [47] concerning shipping information in this matter."

(Testimony of Jack M. Kaplan.)

Q. Mr. Kaplan, what next occurred in connection with this transaction?

A. Well, I called Prince-Keeler the latter part of October, October 21st, and asked if they had received any confirmation of shipping arrangement with reference this contract which called for first shipment October 31st approximately, because I had had no knowledge up to this time of any shipping arrangements having been in process or concluded.

Q. Mr. Kaplan, on October 25, 1955, did you write a letter to Mr. Sternau?

A. I did. I wrote a letter which referred to the original conversation I had with him in September requesting any—directly from him, any information he could give me with reference to the status of these apricot kernels to be shipped to me.

Mr. Eisner: You have the copy of that letter. If the Court please, a photostatic copy of that letter is in evidence as Exhibit 15, and just referring to it, so the Court will have it in mind, this is the letter that Mr. Kaplan wrote to Mr. Sternau:

“Dear Mr. Sternau:

“With reference to our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California we had an opportunity to talk about the [48] matter on the phone. At that time, you indicated to me as a result of Sewell Brown Co. loss of cracking plant by fire, you were attempting to accomplish your crack out of pits with other people, and asked if I could be of some help.

(Testimony of Jack M. Kaplan.)

“As you know, I immediately obtained the co-operation of California Packing Corporation. Mr. Carol Glenney stated that he had arranged with Mr. Engell (Calpak plant manager) to accomplish the crack out for your account at some future date which would be convenient for both parties—details to be finalized between you subsequently.

“At this time I would appreciate hearing from you as to the existing arrangements, insofar as we might be posted on approximate shipping dates of kernels on contract.

“We do not mean to press you for prompt shipment, but we do need some confirmation from you on the approximate schedule in order that we may plan our own affairs intelligently.

“Please be kind enough to give us a prompt reply and accept our thanks for same.”

Q. Mr. Kaplan, what next occurred in this matter?

A. I heard nothing further for several days, and on November 1st I phoned Prince-Keeler and Company, advising them that I [49] had not received any information as a result of my request for it, and that at this time I was going to make a written demand for the delivery, and that unless I had some immediate action on this, I would formally indicate that I would take action for breach of contract.

And I wrote such a letter confirming this conversation to Prince-Keeler.

(Testimony of Jack M. Kaplan.)

Q. And you wrote that letter to Prince-Keeler and Company? A. Right.

Q. Was that letter dated November 1st, 1955?

A. It was.

Mr. Eisner: And that letter, if the Court please, is Plaintiff's Exhibit No. 22, and just referring to it, it reads as follows:

"This confirms our telephone conversation this day. We refer to your bought note 9-12079 of 9/1/55. As you know from the many attempts made both by your office and ourselves, which include your telegram of October 21st, and our letter to your principal of October 25th, we have been patiently waiting for some acknowledgment of scheduled shipments with no results accomplished to date.

"Subject contract calls for first shipment by October 31, 1955. We have no alternative on this date, other than the following: [50]

"We hereby notify you officially that unless we have a reply concerning shipment due us, we shall take immediate action against shipper of his breach of contract by failure of delivery."

Copy of that letter was sent by Prince-Keeler and Company to the defendant.

Q. Mr. Kaplan, what next occurred in this matter?

A. I next received a letter from Prince-Keeler and Company under date of November the 3rd, which in turn quotes from a letter of Sunset-Sternau to Prince-Keeler dated October 31st.

(Testimony of Jack M. Kaplan.)

Q. Do you have that letter? A. I do.

Mr. Eisner: I am going to offer this in evidence, counsel. A copy of it is in evidence.

The Witness: Those enclosures were received with the letter, as you see it.

Mr. Eisner: Yes. I am going to offer this letter in evidence, if the Court please.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 39 admitted and filed in evidence.

(Letter dated November 3, 1955, from Prince-Keeler to American Almond was marked Plaintiff's Exhibit No. 39 in evidence.)

Mr. O'Connor: What previous exhibit is that, counsel? [51]

Mr. Eisner: I will look in a moment, counsel, when I get the date of it. I am not quite sure looking at it.

If the Court please, this is upon the letterhead of Prince-Keeler and Company, Inc. It is dated November 3, 1955.

(Reading letter.)

Then there was also annexed to this letter a carbon copy of a letter that Prince-Keeler and Company wrote to Sunset-Sternau Food Company reading as follows:

(Reading letter.)

Then another carbon copy annexed to that dated November 3, 1955.

(Reading letter.)

(Testimony of Jack M. Kaplan.)

Q. (By Mr. Eisner): Mr. Kaplan, after receiving this letter from Prince-Keeler and Company with its enclosures, what next occurred?

A. Well, I received this on November the 4th and I sent a letter to Prince-Keeler acknowledging receipt of this letter and indicating further——

Q. Just when did you send that letter?

A. November 4th.

Q. November 4th. Do you have a copy of that letter? A. I do.

Mr. Eisner: I believe this is in evidence. Just a minute, I don't see it.

We offer this carbon copy of this letter into evidence, if the Court please. [52]

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 40 admitted and filed in evidence.

Mr. O'Connor: What is the date of the letter, Mr. Eisner?

Mr. Eisner: November 4th, 1955.

(Mr. Eisner thereupon read the letter from American Almond Products to Prince-Keeler and Company, dated November 4, 1955, which has been marked Plaintiff's Exhibit No. 40 in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, after receipt of the letter of November 3rd and your letter of November 4th, 1955, what next occurred?

A. I received another letter from Prince-Keeler and Company under date of November 7th, and I will give you the original of that letter.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: This letter is in evidence—a copy of the letter, I believe.

Mr. O'Connor: That is Plaintiff's Exhibit 26, I believe, counsel.

Mr. Eisner: No, this is not the letter, counsel.

Mr. O'Connor: November 7th?

Mr. Eisner: November 7th. I will just offer this in evidence.

The Court: Let it be marked next in order.

The Clerk: Plaintiff's Exhibit 41 admitted and filed in evidence.

(The letter dated November 7, 1955, Prince-Keeler and Company to American Almond Products Co. was marked Plaintiff's Exhibit No. 41 in evidence and was read by Mr. Eisner.) [53]

Q. (By Mr. Eisner): Mr. Kaplan, after receipt of this letter of November 7th, what next occurred?

A. Well, I waited a period—I waited for the period of ten days to expire, as described in this letter, and nothing happened. And at that point I decided to come to California and see first-hand what I could do to straighten this matter out, if anything at all, and I made plans to come to California at that time.

Q. And when did you arrive in California?

A. As best I recall, it was November the 14th, a Monday.

Q. 1955? A. 1955.

Q. And what next occurred?

(Testimony of Jack M. Kaplan.)

A. Well, I called Mr. Sternau from your office. I was in your office at the time; I called Mr. Sternau on the telephone and I had a conversation with him.

Q. Can you state——

A. I have notes, by the way, of these. At this time I began to take detailed notes of the transactions that were occurring, because I strongly suspected that I might need some recollection of these things at a later date, and I have notes of these conversations.

Q. You made the notes at the time?

A. That is correct.

Q. At the time that these conversations took place? [54]

A. Right.

Q. Will you state the substance of the conversation that you had with Mr. Sternau?

A. Yes, I will.

Mr. O'Connor: If the witness is going to use some notes, I would like to examine some notes.

The Witness: Surely.

Mr. O'Connor: May I be accorded the privilege of seeing them?

Mr. Eisner: No objection.

Q. Those notes are in your own handwriting?

A. They are, made at that same day. They were made in the evening of that day. I was at a hotel here and used the hotel stationery to put into diary form, so to speak, the conversation of the day—the transactions of the day.

Q. Mr. Kaplan——

(Testimony of Jack M. Kaplan.)

The Witness: By the way, I have additional notes for the next day's transactions, if you want to look at those, counsel, while you are here.

The Court: What is this day the witness is referring to?

The Witness: The day subsequent to this, which was the 15th, where we had an appointment with Mr. Sternau in Modesto, and from which point we went to speak with Mr. Bonzi at his attorney's office—Mr. Prince, I believe his name was. That was the day that occurred. I have notes on those transactions. [55]

Q. (By Mr. Eisner): Mr. Sternau was present? A. That's correct.

Mr. O'Connor: Let me see those notes.

A. Surely. That is November 15.

Mr. Eisner: It is a good thing you are not trying to read my notes, counsel.

Mr. O'Connor: If the Court please, so far as the qualification of the witness to talk from notes is concerned, I would ask leave of Court to direct a few questions to him; that is, as to his right to read these notes and refresh his memory on the witness stand from these notes.

Mr. Eisner: I do not quite follow you.

Mr. O'Connor: I want to question his qualification to use the notes as a means to refresh his memory.

Mr. Eisner: Yes. It is subject to qualification that they are proper means of refreshing memory, and the determination of when they were written

(Testimony of Jack M. Kaplan.)

with respect to the events in relation to the notes.

The Court: As far as the evidence discloses, he has already testified that the first notes presented were written at his hotel that evening on the day that he had that conversation.

Mr. O'Connor: Yes, he did, just as far as the first notes were concerned. I might just shorten it up by asking when he made these notes. [56]

The Court: Very well.

The Witness: The evening of the 13th, similarly the evening of the events of the day.

Q. (By Mr. O'Connor): Where were they written?

A. I didn't hear the question.

Q. Where did you write them?

A. Where were they written?

Q. Yes.

A. They were written at the hotel; I believe you will see that it is on hotel stationery. At the time I was at the Hotel Sutter and used the stationery of that hotel.

Q. In the evening of that day?

A. That is correct.

Q. And that was after you returned from Modesto?

A. That is correct. You have there notes of the 15th. I have here notes of the 14th, and the same evening I sent a telegram to my New York office confirming the events of the day. I have the original of that telegram here.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: That is a self-serving document. We won't bother with that.

I would like, while you are questioning the witness on these notes of the 14th, I would like to have a chance to read these; it might speed up things.

Mr. Eisner: All right.

Q. Now, Mr. Kaplan, you may refer to the notes that you made [57] of your conversation of the 14th for the purpose of refreshing your recollection. And will you state now the substance of the conversation that you had with Mr. Sternau?

A. Mr. Sternau told me immediately that I would get delivery of my kernels; that Sunset-Sternau had never yet fallen down on a contract, and above all, I should remember that I would get delivery here.

He continued further, saying that a Mr. Rudy Bonzi was in possession of the kernels in the form of pits uncracked; that Mr. Rudy Bonzi had these pits, they were in his possession; and that he was obtaining—taking measures to obtain—to get these kernels from Bonzi; he had been busily at it for several days and that Mr. Bonzi had an agreement with Mr. Sternau which was a verbal agreement—and apparently he had made an attempt *to this* verbal agreement reduced to writing, and Mr. Bonzi and Mr. Sternau——

Q. Just state the conversation.

A. That was all in the conversation. Mr. Bonzi and Mr. Sternau, had, in the presence of Mr.

(Testimony of Jack M. Kaplan.)

O'Connor, discussed the question of reducing this agreement to writing, but Mr. Bonzi had refused to do so, and had refused further to give any indication as to what date of delivery would be applicable here as to giving the kernels to Sunset-Sternau Company. He refused to give a specific date of delivery, but he agreed he had a verbal agreement with him. [58]

And he indicated further that Bonzi had an additional quantity of kernels, or of pits in this case—apricot pits—which were sold to Continental Nut Company, but this particular lot which was sold to Continental Nut Company had nothing to do with the apricot pits involved in the arrangement with Mr. Sternau.

And he further advised me that Mr. Raymond O'Connor, his attorney would give me any further information I wanted reference this matter, and that was the end of that conversation, except that I might say we indicated that we would arrange to meet together the next day in Modesto.

Q. You made arrangements for an appointment? A. Right.

Q. The next day did you go to Modesto?

A. We did.

Q. Who went?

A. You did, Mr. Eisner. You and I went together; we went to Modesto and saw Mr. Sternau at his office there.

Q. All right. Did a conversation take place with Mr. Sternau?

(Testimony of Jack M. Kaplan.)

A. It did, and I have a great many notes on that now in possession of Mr. O'Connor.

Q. While Mr. O'Connor is looking at that, I will ask you another question, Mr. Kaplan.

When you were here in September on your prior trip, did you purchase apricot kernels—regular apricot kernels—at that [59] time?

A. Yes, I did.

Q. And at what price were you able to purchase regular apricot kernels at that time?

A. Talking about my September trip?

Q. Yes.

A. I purchased on September 23rd from Rosenberg Bros. five cars, 35 tons each, of regular apricot kernels, at 28 cents per pound.

Q. 28 cents? A. 28 cents per pound.

Q. Turning now, Mr. Kaplan, to the conversation that was held in Modesto in the presence of Mr. Sternau, referring to your notes to refresh your recollection, will you please state what transpired at that meeting and conversation?

A. Well, we met Mr. Sternau in his office in Modesto, and you were present, and Mr. Sternau immediately told us that Bonzi had enough pits still in his possession on his premises in the area to crack out and deliver to us the 75 tons of kernels, referring to our contract; they were still in existence and which were sold to us.

As a matter of fact, he indicated further that he himself—Mr. Sternau himself—had 60 tons of wet pits, that is, uncracked pits, which belonged

(Testimony of Jack M. Kaplan.)

to him, which he voluntarily offered to give to Mr. Bonzi as a consideration, without charge, [60] in order to finalize this matter—as an encouragement and consideration to finalize it.

He had had so much with it for days and days—he had lost a lot of sleep in the matter, and the office was very confused as a result of all this, and he had offered this consideration, which was quite a valuable lot of merchandise; but he couldn't get anything from him; nothing could be reduced to writing.

By the way, Bonzi had agreed to meet us later at his office, I think it is Mr. Prince, his attorney's name, 11:30 that day.

Q. Have you given us the conversation of what the conversation was? A. With Mr. Sternau.

Q. With Mr. Sternau? A. Right.

Q. Well, thereafter, on the same day, was a meeting held at Mr. Bonzi's, at his attorney's office, and at which Mr. Sternau was present?

A. There was.

Q. And what transpired at that meeting?

A. Well, Bonzi said—Mr. Bonzi volunteered the information and said that he originally had 1,000 tons on hand at the beginning of the season, so he had sold 400 tons of this material—apparently that was the Continental Nut matter I have previously described—and he had 300 tons balance, and [61] four and three makes a total of seven, which was the final tonnage, as against the original estimate of a thousand. This was voluntarily given

(Testimony of Jack M. Kaplan.)

to us by Mr. Bonzi. But he still had these 300 tons on hand and that he would like to make delivery because—I have a note here that “Rains were predicted for tomorrow”; the rainy season was coming; he didn’t want the stuff to sit around exposed to the weather, and he would like to make delivery.

Now, apparently, Mr. Eisner, you had said at that time:

“Assuming we get a reasonable agreement with Calpak to crack out with reference cost, why don’t we settle the matter right here and now?”

And Mr. Prince, attorney for Mr. Bonzi, interrupted and said:

“Well, he was entitled to quote expenses on this matter because Mr. Sternau had promised that a plant would be available to crack this material and it was not available at the date originally promised; it still was not available; that they had suffered storage charges, finance charges, all of which amounted to expenses he believed he was entitled to before any settlement could be made with reference to delivery.”

Then I have here a note that Mr. Eisner said we would sue Sunset-Sternau for damages on a replacement value of about 42 cents current market value for this material and [62] that Sunset-Sternau obviously would have to sue on that matter, too, on that basis of price.

And at this point Mr. Prince said to Bonzi, quote:

(Testimony of Jack M. Kaplan.)

“We talked about a 25 cent market this morning. We will have to change our figures now.”

And basically that was the end of the conversation because Mr. Prince said that he had to try a case at 1:00 o'clock that day and that he would be back at 4:00 o'clock.

Q. Thereafter did you have another meeting in the afternoon, or what transpired?

A. I want to refresh my memory from these notes here for a moment.

Oh, yes. We were back in Mr. Sternau's office after having lunch. We arrived at Mr. Sternau's office about 1:30, approximately, and there we met Mr. Steve—I assume this is Steve Tarrico; is that his name?

We met Steve there, who said when Mr. Sternau was in New York he phoned him the offer of 17 and a half cents and that Bonzi was present in the office and Bonzi had approved the deal, but now he was welching. He said further, “If we can get the cooperation of Bonzi in this matter, how soon would I need delivery?”

I indicated in reply to this that the specific date of delivery wouldn't be too pertinent; we could arrange for delivery which would be satisfactory for our purposes; whether [63] it was sooner or later didn't matter too much; in my opinion, I could get our New York office to accept any reasonable delivery date; that was no matter, really, for discussion.

(Testimony of Jack M. Kaplan.)

Mr. Bonzi then called California Packing Corporation.

Q. Just a moment. Was Mr. Bonzi present at this conversation? A. Yes, he was.

Q. I see. Mr. Bonzi you had not mentioned——

A. He was not present while we were talking to Steve, I wouldn't say then, but he arrived later that afternoon.

Q. At the plant at the Sunset-Sternau?

A. That's correct.

Q. What transpired then?

A. Mr. Bonzi called the California Packing Corporation trying to contact Mr. Glenney in attempting to get a price for the crack out and finalize the delivery of his apricot kernels, or, rather, pits in this case.

He advised us that Mr. Glenney was not present when he called; he was notified that Mr. Glenney would be back at 4:00 p.m., and he indicated that he would discuss the matter the next morning at 10:00 o'clock, and we left.

I have another note here that I notice would be of interest.

When Bonzi left, Mr. Sternau and—I think you were with us, too, Mr. Eisner; yes, you were—you, Mr. Sternau and myself, had then gone to Mr. Sternau's Almondale cracking plant. That is the next thing that happened that afternoon—where [64] Mr. Sternau showed me some equipment that he had had for sale. He offered me a three roll refining machine which he had used to pulverize

(Testimony of Jack M. Kaplan.)

nut meats when he was in the nut paste business, and he had showed that to me among other things, and he asked me if I would be interested to purchase it.

And in brief, we didn't purchase it because of the difficulty in price of water shipment from that point to New York; it wasn't worth while.

That was the remainder of the afternoon. We spent that time looking at the plant.

Q. Was that equipment for use in the making of almond kernel nut paste?

A. I couldn't specifically answer that, but I do know that Mr. Sternau, or Sunset-Sternau, was in the nut paste business. That might be almond paste, macaroon paste, kernel paste. But he was in the nut paste business, and he had discontinued it, he indicated that to me.

Q. After this conversation that you have just related, what next occurred, Mr. Kaplan?

A. As far as I know, that was the end of all discussion with Mr. Sternau that day, and I had returned to New York.

Q. And on November 16, 1955, did you receive any advice from me that I had received word from Mr. O'Connor that delivery would not be made?

A. That's right; you had phoned me and had given me the [65] information which I believe—I believe at this time that you had received a letter and you had read the letter to me or the essence of that letter.

(Testimony of Jack M. Kaplan.)

Q. A letter from the attorneys for Bonzi—Mr. Bonzi? A. Right.

Q. And I told you of the telephone conversation with Mr. O'Connor?

A. With Mr. O'Connor.

Q. That delivery would not be made?

A. That's correct.

Q. That was on November 16, 1955?

A. That's correct.

Q. Was the first time, Mr. Kaplan, that you received notice or information from Sunset-Sternau Food Company directly or indirectly that delivery of the apricot kernels which you had purchased would not be made? A. That is correct.

Q. Mr. Kaplan, on November 16, 1955, what was the market price of regular apricot kernels, f.o.b. dock, San Francisco, of the exact kind and character that you had purchased from Sunset-Sternau Food Company?

A. To the best of my knowledge it was about a 43 cent price at that date.

Mr. O'Connor: May I ask what date that was?

Mr. Eisner: November 16, 1955. [66]

Q. Now, Mr. Kaplan, you stated that you purchased apricot kernels in September, I believe September 23, 1955, when you were here for 28 cents.

A. That's correct.

Q. Did the market go up after that time?

A. It had been going up steadily from that point at a definite trend of higher and higher and higher daily.

(Testimony of Jack M. Kaplan.)

Q. Now, did you personally—I mean American Almond Products Company—purchase regular apricot kernels f.o.b. dock, San Francisco in the month of November, 1955? A. I did.

Q. What date in November, 1955, did you purchase regular apricot kernels?

A. On November 7th, 1955, we purchased 60,000 pounds of regular apricot kernels.

Q. At what price?

A. 40 cents per pound.

Q. 40 cents per pound? You have the contract there at that price? A. Right.

Mr. Eisner: We offer this contract in evidence as plaintiff's exhibit next in order.

Mr. O'Connor: Are these related documents?

Mr. Eisner: Yes.

Q. The blue copy is really the contract, isn't it?

A. That's correct.

Mr. Eisner: Just so there won't be any superfluous documents, I will just introduce the contract itself.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 42 admitted and filed in evidence.

(Contract referred to was marked Plaintiff's Exhibit No. 42 in evidence.)

Mr. Eisner: This is a contract from California Packing Corporation for 60,000 pounds of regular apricot kernels at 40 cents per pound, not exceeding five per cent by weight broken.

Q. Mr. Kaplan, if you had been advised at a

(Testimony of Jack M. Kaplan.)

prior date, say September 23, 1955, that Sunset-Sternau Food Company would not deliver the apricot kernels, would you have covered your requirements and this contract at a lower price?

A. Most definitely.

Mr. O'Connor: Just a minute. If the Court please, I will object to the question as calling for the opinion and conclusion of the witness on the matter of damages; it tends to be involved in speculation of the witness as to what he would or would not have done at a prior date had certain facts been made known to him.

Mr. Eisner: The purpose of this question, if the Court please, is not proof of market value, but the proof is for this [68] purpose: The defendant has pleaded the statute of frauds, if the Court please, here, and in addition to other principles which prevent them from relying on that, there is the principle of estoppel; and the law is quite definite that if a seller who has entered into, let us say a contract within the statute of frauds, promises delivery, and in reliance upon such promises, the buyer does not avail himself of the ability to cover at a lower price and the price thereafter advances to his detriment, that the seller is estopped from relying upon the statute of frauds for the reason that the buyer, by reason of the conduct of the seller, has relied upon such conduct and acted to his detriment, and consequently the seller is estopped to rely upon that.

I have authority to that effect, and that is the

(Testimony of Jack M. Kaplan.)

purpose of this question, if the Court please, and it is not for the purpose of establishing market value.

Mr. O'Connor: If the Court please, in connection with the question of estoppel, we have a situation which has just delivered by the last exhibit. We find the date November 7, 1955, was the date that a contract was entered into with Calpak for 60,000 pounds of these kernels.

By testimony adduced prior to that, it was determined that they had never received absolute word, according to their own statement, taking their evidence at its face value——

Mr. Eisner: Until November 16. [69]

Mr. O'Connor: Until November 16. They now go back to a prior date in order to establish an estoppel. The estoppel will depend, if the Court please, not only upon conduct of the buyer,—of the seller—but also conduct of the buyer and his right to rely upon the conduct of the seller, the right in this case to be determined from all of the facts. And one of those facts will be the fact as to whether or not he had a right at that time to say there was or was not a contract.

The question as to whether or not he was relying solely upon Sunset-Sternau for this particular contract, or whether his conduct was influenced by other factors—it is certainly calling for speculation at this time and not any proof of any estoppel, to ask him a question which will call for a self-serv-

(Testimony of Jack M. Kaplan.)

ing answer as to what he would have done in September of 1955.

The Court: The Court is prepared to rule.

Mr. O'Connor: Very well.

The Court: The objection will be overruled. It goes in evidence subject to a motion to strike.

Mr. O'Connor: Subject to a motion to strike, your Honor.

Mr. Eisner: Would you kindly read the question to the witness? Do you have the question in mind?

A. I have not.

Mr. Eisner: We will have the reporter read it.

(The reporter read the question.)

A. Most definitely.

Mr. Eisner: I think that is all.

The Court: We will take a recess.

(Recess.)

Cross Examination

Q. (By Mr. O'Connor): Now, Mr. Kaplan, I believe you have told us upon your direct examination that you have been in the paste business for many years; that is, making paste out of these apricot kernels, and you have described the process to us.

Mr. Eisner: You had better answer out loud so the reporter can hear you and get it.

Q. (By Mr. O'Connor): Is that correct?

A. That's correct.

Q. And for how many years have you been so engaged?

A. Personally, or the firm?

(Testimony of Jack M. Kaplan.)

Q. Personally. A. You mean myself?

Q. Yes. A. Ten years, approximately.

Q. Ten years. That would put it about 1947?

A. That's correct.

Q. And during the time that you were in the business, did you ever buy from Sunset-Sternau any apricot kernels? [71]

A. You mean prior to this contract?

Q. Prior to this deal.

A. Not to my knowledge, no, sir.

Q. Not to your knowledge.

You do the buying—you supervise the buying for your firm, do you not? A. That is correct.

Q. And all the contracts pass through your hands? A. That is correct.

Q. And you are the secretary of the corporation, are you? A. That is correct.

Q. And I take it, general manager, also?

A. Well, it is a question of definition of general manager.

Q. Well, you generally supervise the business, I presume?

A. Some parts of it. I have nothing to do with production except in an indirect manner. We have a production manager who is directly involved with production.

Q. You supervise the buying and selling of the products generally speaking?

A. That is correct.

Q. Is the making of that paste that you have

(Testimony of Jack M. Kaplan.)

described the sole business of the American Almond Company?

A. We have other products, if that is the answer you are looking for. We sell paste, nut paste, one of which is the kernel paste, and we sell many other products, as well. [72]

Q. Yes, and your kernel paste is just one of the many products that you sell?

A. That is correct.

Q. By the way, you likewise buy and sell through Prince-Keeler and Company of New York, do you not?

A. We sell a very limited amount of goods through Prince-Keeler. He has one account in Puerto Rico and one account—that is in Puerto Rico, and one account in New England. Basically, to my knowledge, there may be one other, but in total these two or three accounts through whom we sell merchandise—that is, through Prince-Keeler—are very negligible. If you want an estimate of the total sales per month or per annum, I could tell you it is a very insignificant factor, but the answer is yes.

Q. Mr. Astrack from that office generally—at least about the time of this deal in 1955—serviced your account, didn't he?

A. That is correct.

Q. And it was through Mr. Astrack that you met Mr. Sternau in July of 1955?

A. I had met Mr. Sternau prior to that date. It was not through Mr. Astrack that I had met Mr. Sternau.

(Testimony of Jack M. Kaplan.)

Q. You had done business with Sunset-Sternau Company before that time?

A. That is correct. [73]

Q. And you did business, as a matter of fact, during this period of time in 1955, did you not?

A. That is correct.

Q. And on the occasion of your meeting in 1955, Mr. Kaplan, concerning the discussion of the sale of apricot kernels in question, it came out at that conference, did it not, that this was the first time that Sunset was engaged in that particular field or line of activity?

A. It was the first time that I had been offered apricot kernels by Sunset-Sternau Company. I could not say that I had knowledge or did not have knowledge, either way, that there might or might not have been other negotiations with kernels prior to that date, but I certainly had not knowledge of it directly. This was the first time I had been offered kernels from Sunset-Sternau.

Q. Well, wasn't it discussed with you at that conference that Sunset-Sternau was new in the business of selling apricot kernels?

A. If there was such discussion at all it was of insignificant duration of time or material significance—had no material significance. I have no definite recollection of any serious discussion about it.

Q. Well, weren't you advised by Prince-Keeler that this was the first time that Sunset was selling apricot kernels?

(Testimony of Jack M. Kaplan.)

A. To me definitely, and whether there was any discussion [74] about other parties, I have no recollection; but I know distinctly to me, as far as I was concerned, that Prince-Keeler had indicated that it was the first transaction on kernels that they had ever handled, and they were rather unfamiliar with the normal confirmations of such sales, the normal terms, and we had discussed—prior to any written sold or bought note, we had discussed in a superficial way some of the terms of the sale as they appear in such confirmations.

Q. When did you discuss the terms of sale, at that original conference?

A. Oh, no. That was discussed, as I recall, either on September 1st, the date of the confirmation, or possibly the day prior to September 1st.

Q. And at that time, of course you knew that Sunset was new in the business?

A. As far as I was concerned, yes.

Q. And you were advising them of the contract that you wanted?

A. I was advising Prince-Keeler, who was confirming in writing. I had direct knowledge from Prince-Keeler that they had never transacted business in this material; I had no specific knowledge that Sternau or Sunset-Sternau may or may not have dealt in this article prior to that date.

Q. I will show you a letter from Prince-Keeler directed to [75] Sunset-Sternau, which is Plaintiff's Exhibit No. 7 in evidence, and ask you if this

(Testimony of Jack M. Kaplan.)

letter signed by Mr. Berke, contains a true statement of your knowledge at that time.

A. What is the date of that letter?

Q. The date of the letter is September 1, 1955, and the letter reads as follows:

“Confirming today’s phone conversation with you”——

and this is addressed to Mr. Steve Tarrico, Sunset-Sternau Food Company, Modesto, California,

“Dear Steve:

“Confirming today’s conversation with you, we immediately contacted the buyer, Mr. Kaplan, of American Almond. He felt that, due to the fact that you fellows were new in the business, he should get a slightly lower price than the current market. However, he went along with us paying your price, 17½ cents. In fact, he was most cooperative.”

Would you say that you made that statement to Mr. Berke, or was Mr. Berke incorrect in his statement in this letter?

A. I would say basically it is a correct statement.

Q. Now, you received from Prince-Keeler under the same date their bought note which is Plaintiff’s Exhibit No. 8, and which has been introduced in evidence in this case, relative to approximately 75 tons of regular apricot kernels at [76] 17½ cents per pound, did you not?

A. That is correct.

Q. Do you have a copy of that with you, sir?

(Testimony of Jack M. Kaplan.)

A. I do. I have a photostat of it.

Mr. Eisner: By the way, I don't believe the bought note is an exhibit.

Mr. O'Connor: Well, the sold note is; sold or bought, it is the same identical instrument, except that certain carbons contain "Sold" and other carbons contain "Bought."

Mr. Eisner: That's right; both have been introduced into evidence.

Mr. O'Connor: That is correct. The only difference is in the printing.

The Witness: And the signature.

Q. (By Mr. O'Connor): What signature are you referring to, sir?

A. My recollection—I have a photostat of the sold note copy. I originally received the bought note copy. As I recall it, the bought note which I had received, was signed by Mr. Konenbank marked "Thanks"; and I see the sold note——

Q. Who was Mr. Konenbank?

A. I never met the gentleman, but I was told by Mr. Berke that he was at the time a clerk handling these confirmations in Prince-Keeler's office.

Q. He wasn't associated with American Almond? A. No, sir. [77]

Q. By the way, are you a member of the Associated Food Distributors, Inc., of New York City?

A. I am.

Q. Where?

A. I should say the firm is.

Q. The firm is? A. Right.

(Testimony of Jack M. Kaplan.)

Q. You will likewise notice in the lower portion of the contract in large type appear the words "Subject to confirmation of seller"; that is correct, is it not? A. Correct.

Q. You knew at the time you received this note that Sunset-Sternau operated upon only written contracts signed by the buyer and seller, did you not?

Mr. Eisner: That is objected to, if the Court please, as not proper cross-examination, irrelevant and immaterial, what their practice was and how they operated. The question resolves itself down to a question of law as to the effect of these bought and sold notes, together with the recognitions and ratifications subsequent thereto.

Mr. O'Connor: If the Court please, the question is directed at the witness for the purpose of establishing the fact that it was within the contemplation of the parties that a written contract would be entered into. They are pleading custom and usage here as affecting this sale. Our answer [78] contains a denial of any contract. And certain this is proper cross-examination from that standpoint, going into the very contract or the very right or document which these people rely upon.

The Court: The objection will be overruled subject to a motion to strike. Overrule the objection.

Mr. O'Connor: Would you read the question back, Mr. Reporter?

(The reporter read the question.)

(Testimony of Jack M. Kaplan.)

A. I had no reason to believe that that was a consistent mandatory policy for several reasons, on the part of Sunset-Sternau Company.

The Court: What reasons do you have in mind?

A. Number one: To the best of my recollection I had received similar bought and sold—or in my case I would receive bought note copies. To the best of my recollection Prince-Keeler had confirmed several purchases I had made from Sternau—Sunset-Sternau Company—using different forms of such confirmation. That is point one.

Point two is that I—as a buyer, American Almond had made many purchases of apricot kernels from other sellers in California where this broker's confirmation was the sole written evidence of a contract without any subsequent confirmation of a more formal contract.

It was very, very normal for me to assume a great possibility that this would be the final written confirmation, [79] because on its face it reads, among other things, on the top, number one:

“If incorrect, advise immediately.”

Number two, on the bottom—if I can find it here in a moment—under the clause of arbitration on this very document:

“Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Incorporated, New York City. This memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such

(Testimony of Jack M. Kaplan.)

contract, this memo represents the contract of the parties; seller guarantees to conform to National Pure Food Laws.”

And, as I said previously, I had many purchases of apricot kernels from California where such a broker’s memorandum was the sole written confirmation.

Mr. O’Connor: I will move to strike out the answer as not responsive to the question. The question, if the Court pleases, was directed to him, if he didn’t know as a matter of fact that Sunset-Sternau depended upon a formal written contract as evidencing the agreement of the parties.

Mr. Eisner: I think he has——

Mr. O’Connor: Just a minute, counsel. [80]

Mr. Eisner: Very well.

Mr. O’Connor: He has diverted that to include the world at large and his dealings with other firms, without naming them, that he might have done business with. This question is solely directed to this controversy, to these people, to their method of doing business between them.

Mr. Eisner: If the Court please, he has answered the question and has explained his answer. As a matter of fact, he has stated “for several reasons.” The Court asked him, “What were the several reasons?” and he has given the explanation as to why he didn’t know and didn’t believe that the broker’s memorandum was not the final arrangement or what the practice of Sunset-Sternau was.

(Testimony of Jack M. Kaplan.)

He is certainly entitled to give his answer and explain his answer.

The Court: The objection will be overruled. Let the record stand.

Q. (By Mr. O'Connor): Well, as a matter of fact, Mr. Kaplan, in 1954 you entered into an agreement with Sunset-Sternau which was evidenced by a written contract under the caption "Sunset-Sternau Food Company Sales Contract."

I think you have already seen this, counsel. This is the one I showed you.

The Witness: 1954?

Mr. O'Connor: Yes.

Mr. Eisner: This is a contract for almonds, counsel. [81]

Mr. O'Connor: That is correct; it is a contract for almonds.

Q. Is that your signature on that document, Mr. Kaplan? A. It is. That's correct.

Q. That was a contract that was submitted to the American Almond Company by Sunset-Sternau Food Company?

A. That is correct. I am wondering what the sales memorandum——

Q. If you will note, Mr. Kaplan, under the heading "Broker" appears the name "Prince-Keeler and Company, Inc." and their sales order, does it not, on the lower right-hand side of the upper portion? A. It does.

Q. So that the purchase that you made at that time from Sunset was through PrinceKeeler and

(Testimony of Jack M. Kaplan.)

Company, was it not? A. That is correct.

Q. And it was confirmed by this written contract; isn't that correct?

A. That is correct.

Mr. O'Connor: If the Court pleases, I will—that this go into evidence as Defendants' Exhibit first in order.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit B admitted and filed in evidence.

(The contract referred to was marked Defendants' Exhibit B in evidence.) [82]

Q. (By Mr. O'Connor): Now, this is another document. As a matter of fact, during the period of time that this contract for apricot kernels was under consideration between American Almond, Prince-Keeler and Company and Sunset-Sternau, you entered into another contract for the purchase from Sunset through Prince-Keeler and Company of shelled almonds? A. That is correct.

Q. I will show you a contract, No. 2206, and the heading "Sunset-Sternau Food Company Sales Contract," dated October 18, 1955, buyer, American Almond Products Company, and signed by yourself; that is correct, is it not?

A. That is correct.

Q. That is your signature?

A. It is my signature.

Mr. O'Connor: If the Court please, I will ask that this be marked as Defendants' exhibit.

The Court: Let it be marked in order.

(Testimony of Jack M. Kaplan.)

The Clerk: Defendants' Exhibit C admitted and filed in evidence.

(The contract referred to was marked Defendants' Exhibit C in evidence.)

Q. (By Mr. O'Connor): Mr. Kaplan, following the delivery to you of the bought note which has been referred to here as Plaintiff's Exhibit No. 8, you were informed by Prince-Keeler and Company, Mr. Frank Sullivan of that firm, that Sunset-Sternau Company had sent their formal contract on to New York [83] for signature by American Almond Company, were you not?

A. What was the date you are referring to? September 8, is that correct?

Q. I am referring to the fact that following—I will restate my question.

Following your receipt of Plaintiff's Exhibit 8, the bought note——

The Witness: Can I have some reference to what that exhibit is?

Q. (By Mr. O'Connor): Exhibit 8 is the bought note. A. I see. Yes.

Q. You were informed some days following your receipt of that bought note dated September 1st, 1955, that Sunset-Sternau had sent its formal contract on to Prince-Keeler to be forwarded to you for signature, were you not?

A. That is correct.

Q. You were likewise informed by Mr. Frank Sullivan of the firm of Prince-Keeler and Com-

(Testimony of Jack M. Kaplan.)

pany, that he was going to mail that contract to you, were you not? A. Yes.

Q. And you advised him that the contract should contain a clause which reads as follows:

“Merchandise not to exceed five per cent by weight broken kernels.”

Isn't that correct? [84]

A. Not the way you word it. You said “should contain a clause.” I advised Mr. Sullivan that many such contracts do contain such a clause; that it was normally understood in the trade as an implied thing, and in some cases they were in the contract—this clause was in the contract, and in some cases this clause was not in the contract; but in view of the fact that this was an initial delivery, I would prefer that it be clearly stipulated in the contract, and I requested that it be returned to the maker for such stipulation.

Q. As a matter of fact, Mr. Kaplan, it is usual in your business, in the business of buying kernels, that that clause be in the contract; isn't that a fact?

A. It is not a fact.

Q. Let me show you Plaintiff's Exhibit No. 42, which is apparently a contract; it is a bought note or—yes, it has been signed—wherein American Almond Products Company under date of 11/7/55, November 7, 1955, bought from the California Packing Corporation, New York, 60,000 pounds of apricot kernels at 40 cents a pound.

I will ask you to examine that contract and state

(Testimony of Jack M. Kaplan.)

whether or not the clause "five per cent by weight broken kernels" isn't in that contract.

A. It is in the contract, and it always appears in Calpak's contracts.

Mr. O'Connor: Mr. Eisner, I think you have the two [85] contracts which you showed me earlier in the month of August, 1955, with Calpak, and with Rosenberg Bros.—I believe those were the two firms—which have not been introduced in evidence. May I see those documents, please?

Mr. Eisner: I have no recollection, but if the witness has them, I have no objection.

Mr. O'Connor: I was shown the documents at the outset of the trial.

The Witness: What are the dates, counsel?

Mr. O'Connor: In the month of August, 1955. I was shown by Mr. Eisner two contracts which have not been introduced in evidence.

The Witness: I may have them on the desk.

Mr. O'Connor: May I have a ruling of the Court that they be produced?

The Witness: August, 1955?

Mr. O'Connor: That is correct.

The Witness: I have one here of September, 1955. Is that the one that we were discussing previously?

Mr. O'Connor: That has been referred to in evidence, but there were two documents which were shown to me at the outset of the trial dated in the month of August where the sales were for 17½ cents.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: We have introduced those two contracts at 17½ cents, counsel. Maybe they are in evidence if you [86] will look.

Mr. O'Connor: I am sorry, your Honor; they are in evidence. My memory over the weekend must have failed.

The Witness: California Packing?

Mr. O'Connor: Yes.

Q. I will show you these two contracts which are entitled Plaintiff's Exhibit No. 37. Referring to the contract of August 26, 1955, buyer American Almond Products, seller, California Packing Corporation, New York, for 140,000 pounds apricot kernels at 17½ cents a pound, and ask you to examine that contract and tell us whether or not the clause "five per cent by weight broken kernels" isn't in that contract?

Mr. Eisner: Of course, the contract speaks for itself, and the witness stated in all California Packing Corporation contracts that appears, but not in others.

Mr. O'Connor: Very well; let's have the answer "Yes."

Q. The clause appears there, does it not?

A. It does; it says "not exceeding five per cent by weight broken."

Q. Yes. Now we have, I believe it is another contract attached to this—yes—and it is part of the same exhibit, a contract dated August 31, 1955, the same firms involved, for 70,000 pounds apricot kernels at 17½ cents per pound, and ask you if the

(Testimony of Jack M. Kaplan.)

clause "not exceeding five per cent by [87] weight broken" does not appear in that contract?

A. It does appear in the contract.

Mr. O'Connor: May I see the contract submitted, the 28-cents a pound purchase, counsel?

The Witness: Right here.

Q. (By Mr. O'Connor): What firm is that, please? A. That is Rosenberg Bros.

Q. Let me ask you this, Mr. Kaplan: Did you not instruct Prince-Keeler and Company to return Sunset's formal contract for insertion of the five per cent clause? A. I did so instruct them.

Q. And you also instructed them, did you not, that the five per cent clause should be included in the so-called bought note of September 1st; isn't that correct? A. That is not correct.

Q. Well, let me allow you to read this Plaintiff's Exhibit No. 10, which is in evidence, and ask if the statements by Mr. Frank Sullivan are not correct—are correct or incorrect.

A. Well, I will read it out loud.

(Reads) Dated September 8th, Frank Sullivan, addressed to Sunset-Sternau Company.

"Gentlemen: Mr. Kaplan of American Almond Products Company, Incorporated, phoned today that two 100-pound bags of apricot kernels were received and found satisfactory with one exception: the [88] broken kernels far exceeded the normal tolerance.

"We advised him that we were mailing your formal contract No. 2023, received today. However,

(Testimony of Jack M. Kaplan.)

during the discussion he advised that he had overlooked the following standard clause, quote: 'Merchandise not to exceed five per cent by weight of broken kernels,' unquote, and requested that we add this on our contracts and return yours for the same advised that all his regular suppliers'"——do you want me to go further or is that far enough for your purpose?

Q. That's far enough for present purposes.

A. Right.

Q. So you did advise Prince-Keeler then to add that clause on to the so-called bought note of September 1st, did you not? A. I did not.

Mr. Eisner: That isn't true at all, counsel; that is a misstatement. You had better read the rest of the letter, Mr. Kaplan so that——

The Witness: I have a copy of it which was sent——

Mr. Eisner: Read the rest of it.

The Witness: I have a copy of it which was sent to me by Mr. Sullivan. You have a photostat; I have a copy.

(Reads) ——“‘Merchandise not to exceed five per cent by weight of broken kernels,' unquote, and requested [89] that we add this on our contracts and return yours for the same addition. He advised that all his regular suppliers, that is, Calpak and Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumed it would be included as a matter of course in your contract. We

(Testimony of Jack M. Kaplan.)

are, therefore, returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request.

“Awaiting your further advice in this matter.

“Yours very truly, Prince-Keeler and Company,
Frank Sullivan.”

The Court: What is the date of that letter?

The Witness: September the 8th, your Honor.

Q. (By Mr. O'Connor): Mr. Kaplan, is that a fair statement of the conversation between you and Mr. Sullivan—the entire letter.?

A. In some particulars it is not correct, but generally speaking it indicates the conversation.

Mr. Eisner: Can you point out where it is incorrect?

Mr. O'Connor: Just a minute, if the Court please. You will have your turn, I presume, counsel, in rebuttal.

Mr. Eisner: All right. [90]

Mr. O'Connor: Or on redirect examination. Excuse me.

Q. Now, Mr. Kaplan, was the bought note dated September 1st, 1955 issued by Prince-Keeler and Company ever amended to include the five per cent clause? A. No, sir.

Q. Did you ever thereafter demand of Prince-Keeler and Company that they insert that clause in that contract?

A. No, sir. You mean in the bought note?

(Testimony of Jack M. Kaplan.)

Mr. Eisner: Are you referring now to the bought note or are you referring to the——

Mr. O'Connor: I am referring to the bought note, counsel.

Mr. Eisner: Well, now, if you will just——

Mr. O'Connor: You make your objection.

Mr. Eisner: Let me understand the question so that it is clear, so that the witness understands it.

Mr. O'Connor: As I understand it, the Court is here to supervise the two of us and if you have any objections to my questions, I am certain the Court would be willing and quite anxious to pass upon them. I will submit the matter.

Mr. Eisner: So shall I. Certainly when you refer to a document, I certainly have the right to enquire what you are referring to.

Now you are stating you are referring to the bought note and not to the more formal contract which was signed. If you will let the witness understand the question, I have no [91] objection to his answering.

The Court: Proceed.

Q. (By Mr. O'Connor): Now that we have determined that, Mr.—Mr. Kaplan, you understand, do you not, by the contract which you claim to be in writing in this case, is the bought note of September 1st, 1955, do you not?

Mr. Eisner: Just a minute.

Mr. O'Connor: Now just a minute. If the Court please, counsel was——

The Court: Give him an opportunity to object.

(Testimony of Jack M. Kaplan.)

Mr. Eisner: The understanding of what the contract is is a question of law and I think that it is an improper question, calling for the conclusion of the witness as regarding what document constitutes the contract; it is calling for the conclusion and opinion of the witness on a matter which is a question of law.

Mr. O'Connor: There is a pleading in here, if the Court please, and I am trying to determine for the first time where the contract is in this case from this witness, and I have asked him the specific question on cross examination, may it please the Court, if the bought note of September 1st, 1955, is the contract upon which he is relying. He is the plaintiff.

The Court: Isn't that calling for the opinion and conclusion of this witness as a matter of law?

Mr. O'Connor: No, it is not, because they have pleaded a [92] written contract in their complaint, and I am trying to find out where is the contract—where is the written contract.

The Court: I will allow the question subject to a motion to strike in the interests of time. You may answer the question.

The Witness: Would you re-word the question, please?

Mr. O'Connor: I won't re-word it; I will ask the reporter to read it again.

The Witness: Re-read it. I don't remember the question.

(The reporter read the last question.)

(Testimony of Jack M. Kaplan.)

A. It is my understanding that this is the contract, because I never have seen a more formal contract executed, and it is my understanding, in the absence of a more formal contract, that this is the contract.

Q. (By Mr. O'Connor): Mr. Kaplan, did you ever sign or did any other officer of American Almond Company ever sign any writing with Sunset-Sternau Food Company for the purchase from Sunset of 75 tons of apricot kernels in the year 1955?

A. I have signed some writings, yes. There are letters. If you refer to the word "writings," we have a great deal of correspondence between the parties here, all of which are writings referring to such a transaction, and we have signed many such writings—at least I have.

Q. Did you or any other officer of American Almond Company during the year 1955 sign a formal contract of any kind or [93] description with the Sunset-Sternau Food Company for purchase of 75 tons of apricot kernels? A. No, sir.

Q. All right. Did you or any officer of American Almond Company, on or about September 8, 1955, enter into a written contract and execute it on behalf of American Almond Company for the purchase from Sunset-Sternau Company of 75 tons of apricot kernels?

A. Would you read that question again?

The Court: I suggest you reframe the question in the interest of time.

Q. (By Mr. O'Connor): Did you, Mr. Kaplan,

(Testimony of Jack M. Kaplan.)

or any other officer of the American Almond Company, on September 8, 1955, sign an agreement in writing to purchase from Sunset-Sternau Food Company 75 tons of apricot kernels?

A. No, sir.

Mr. O'Connor: I notice it is 12:00 o'clock. Does your Honor want to recess?

The Court: Very well. We will take a recess until 2:00 o'clock.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [94]

Monday, February 25, 1957—Afternoon Session

JACK M. KAPLAN

called as a witness by Plaintiff, resumed the witness stand, and testified further as follows:

Cross Examination—(Continued)

Mr. O'Connor: May I have the last question and answer read?

(The reporter read the record.)

Q. (By Mr. O'Connor): Now, Mr. Kaplan, at any time from July, when you first saw Mr. Sternau at your plant, until November 16, when your attorney was informed by me that there would be no delivery, did you waive, so far as this particular order was concerned, the qualification that the weight by broken kernels would not exceed five per cent?

A. I would have to answer your question in this manner:

I wouldn't say that I waived it. We discussed it.

(Testimony of Jack M. Kaplan.)

As to whether it became a condition of being waived or not, I wouldn't know; I would let you people decide. We did discuss it. There was an occasion—I think it was during the month of September—when I spoke to Mr. Sternau on the phone. That was the occasion when he indicated that he had difficulty with the cracking. Mr. Sternau, as I recall it, said that because of the fire at Los Gatos at the Sewell-Brown plant, he was having difficulty getting a crack out. [95]

I at that time said to him I felt quite certain that I could arrange for a crack out, and he replied, well, that would be good; but I think it was something like this where he indicated, "If we find difficulty in getting the crack out, would you"—no, I think it was something like this:

He said that "The probability was that I would still have difficulty getting them cracked, unless you would forget about the five per cent minimum broken," and my reply was that I don't think we would ever get involved with such a thing, because "I am quite sure that if Calpak or Rosenberg were to crack them out, then there would be no problem; but in the event we had difficulty getting either of these two well established firms, with a long history in this product"—if we had difficulty and then he had to resort to some other method of cracking, then in that case, I would be very tolerant with the five per cent.

Now, if that is waiving it, that it as I recall it.

Mr. O'Connor: I move to strike the answer as

(Testimony of Jack M. Kaplan.)

non-responsive to the question. The question was: Did the plaintiff in this action ever, in writing, between the period July, 1955, and November 16, waive in writing the requirements that the kernels be not to exceed five per cent by weight of broken kernels?

Mr. Eisner: I take issue with counsel. I am quite confident in listening to the question, he didn't specify waiving [96] in writing. He asked the witness if he waived at any time that condition, and the witness has answered the question by factually telling what occurred, and I think his answer is thoroughly responsive.

The Court: Let the question and answer stand. The objection will be overruled.

Q. (By Mr. O'Connor): Mr. Kaplan, so there won't be any question, did you between the period July of 1955, when you first met Mr. Sternau, and November 16 of 1955—you or anybody on behalf of American Almond Company—waive the requirement that the kernels be not in excess of five per cent broken kernels—not be in excess of five per cent by weight?

Mr. Eisner: Just a moment. That question has been already asked and answered as far as—

The Court: In the interests of time he may answer. The objection may be overruled.

A. In the sense that I have just answered, if you call that telephone conversation waiving it under these conditions, then under those conditions I waived it.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: I move to strike the answer, if the Court pleases, as not responsive to the question.

The Court: Let the question and answer stand. Proceed.

Q. (By Mr. O'Connor): Mr. Kaplan, how many orders or what was the total volume of orders you had with Sewell Brown and [97] Company at the time of their fire?

Mr. Eisner: That is objected to as irrelevant, and immaterial.

Mr. O'Connor: It has a definite bearing on this case, if the Court please, as to whether there was any financial or pecuniary loss suffered by the plaintiff.

The Court: I didn't hear the question. Reframe your question, please.

Q. (By Mr. O'Connor): Mr. Kaplan, what was the total volume of orders for apricot kernels that you had on order with Sewell Brown and Company of Los Gatos at the time of their fire?

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial and not proper cross examination.

The Court: Indicate for the purpose of the record the purpose of that question.

Mr. O'Connor: The purpose, if the Court please, is to determine whether or not, by reason of any failure, if there was a failure of delivery here, whether there was any pecuniary or financial loss involved in connection with the plaintiff's business. The element of how many orders he had of apricot

(Testimony of Jack M. Kaplan.)

kernels with Sewell Brown and Company might be partially determinative of that fact.

Mr. Eisner: May I answer counsel and say this, if the Court pleases: The measure of damages for failure to deliver [98] personal property under contract of sale is well established as being the difference between the contract price and the market value or price of the commodity at the time that delivery is required to be made under the contract.

And so far as this case is concerned, as I have heretofore stated, I believe, the time of delivery having been by promises extended until November 16, 1955, and then the refusal having been given, the measure of damages is of that date.

So whether or not—I would say this: It isn't competent to go any further into business transactions unless we had pleaded special damages, loss of profits, and so forth, which might have, under certain circumstances, be allowable; but in this case we are simply pleading the regular statutory legal measure of damages, which is the difference between the market price and the contract price at the time required for delivery.

That is a matter of law.

Mr. O'Connor: If the Court pleases, I am very happy to hear counsel's statement that he is relying upon the statutory law.

The statutory law in this case revolves around Section 3300 of the Civil Code of the State of California, and the statute is explicit. It reads as follows:

(Testimony of Jack M. Kaplan.)

“For the breach of an obligation arising from [99] contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.” .

And that has been determined by decisions which I can supply to your Honor, and I will do so in the course of the discussion of this case.

The pecuniary loss, in other words, if we have a situation where there was non-delivery, and we have the party obtaining the same merchandise from another party and making the same amount of profit, there has been no loss.

The Court: I can't reason out what the fire in Los Gatos had to do, what causal connection that would have with the issues in this case.

Mr. O'Connor: Yes, it would.

The Court: In what respect?

Mr. O'Connor: Well, in this respect: As to the effect it had upon the market price of apricot kernels. Let me, for the moment, so that I don't—

The Court: The price is the market price, isn't it?

Mr. O'Connor: Pardon?

The Court: The price is the price quoted at that time, whatever the price was? [100]

Mr. O'Connor: There are variable factors there, too, your Honor. There are variable factors, as I understand it.

(Testimony of Jack M. Kaplan.)

For example, if I were to buy high, say two times over the market, and then for my finished product charged a greater amount for it, obviously I wouldn't suffer too much of a financial loss because of the advancement in price.

The Court: That problem isn't before me.

Mr. O'Connor: It may very well be before your Honor in this case.

The Court: With your assurance that it will, I will allow the question, subject to a motion to strike and overrule the objection.

Mr. Eisner: I just want to say first that I must answer counsel that he has the wrong section of the Code which he is relying on for the measure of damage. That is the general clause for ordinary contracts.

Section 1787 of the Civil Code is specifically upon sales measure of damage, and it reads as follows—and I am reading where it is quoted in 116 Cal. App. (2), 485, 596 in *House Grain Co. versus Finerman & Sons*.

“Section 1787 of the Civil Code provides: (1) where the property and the goods has not passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller [101] for damages for non-delivery.

“(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

“(3) Where there is an available market for the

(Testimony of Jack M. Kaplan.)

goods in question, the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of refusal to deliver.”

The Court: Let us proceed.

Mr. O'Connor: The question will be answered, your Honor?

The Court: Subject to counsel's motion to strike.

The Witness: Can I have the question re-read, please?

The Court: I will ask counsel to reframe the question.

The Witness: I forget it now.

Q. (By Mr. O'Connor): How much by volume did you have on order from Sewell Brown at the time of their fire, and we have established that as September 20, 1955.

A. I had a total of 280,000 pounds of regular apricot kernels on order with Sewell Brown. There were in addition [102] steamed apricot kernels—do you want that figure, as well?

Q. Yes.

A. Steamed was 105,000 pounds.

Q. Thank you. Now——

Mr. Eisner: May I interrupt counsel? Mr. Engell has come in. Would you mind if we interrupt the cross examination?

Mr. O'Connor: No, not at all.

Mr. Eisner: And place Mr. Engell on the stand, with your Honor's consent.

RAYMOND L. ENGELL

called as a witness for Plaintiff, being first duly sworn, testified as follows:

The Court: Your full name?

A. Raymond L. Engell.

The Court: Spell that last name?

A. E-n-g-e-l-l.

The Court: Where do you live, Mr. Engell?

A. Alameda.

The Court: Your business or occupation?

A. I am assistant manager dried fruit operations with the California Packing Corporation.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Eisner): What particular branch of the operations of the California Packing Corporation are you in charge of, [103] Mr. Engell?

A. I am assistant manager of the dried fruit operation—of the dried fruit division.

Q. Are you in charge of production?

A. I have charge of production from the standpoint of fruit packing as well as fruit purchases.

Q. How long have you been in the employ of the California Packing Corporation?

A. I have been in the employ approximately 28 years.

Q. Is the California Packing Corporation engaged in the sale of apricot kernels?

(Testimony of Raymond L. Engell.)

A. Yes, sir.

Q. How long, to your knowledge, has it been engaged in the production and sale of apricot kernels?

A. I can answer this way: that prior to my employment with the corporation, they were engaged; how long beyond that time, I don't know.

Q. Has it been so engaged during the entire period in which you have been associated with the company? A. They have been.

Q. Is California Packing Corporation, would you say, one of the large producers of apricot kernels?

A. I would consider it in that category.

Q. Are there different classifications of apricot kernels?

A. In the industry we know apricot kernels as regular [104] apricot kernels and steamed apricot kernels, and any other type of kernel that will not make that classification are described as kernels and generally sold on sample.

Q. Is there a kernel also known as sulphured apricot kernels?

A. That is correct; I am sorry, but it is very insignificant in tonnage.

Q. I think the Court was rather interested; it has been brought up here.

How are sulphured apricot kernels—are they the result of growth or production or the result of what character of growth or production or treatment are they developed?

(Testimony of Raymond L. Engell.)

A. They are pits that are derived from whole apricots that the grower—they generally come from the grower, and the grower normally cuts and pits the apricot. In this particular case he puts the whole apricot into the sulphur house and sulphurs the entire apricot, and then squeezes the pit out of the apricots after they have been sulphured.

Consequently the sulphur penetrates through the meat and into the pit, and they are therefore classified as sulphured pits.

The Court: Squeezes by machine?

A. No, by hand, manually. Sometimes they are cut, but mostly they will squeeze them out. The fruit becomes soft and pliable and just a slight pressure will burst the skin [105] and slide them out.

Q. (By Mr. Eisner): We are interested here in what are called regular apricot kernels, and I will ask you to tell the Court just what are regular apricot kernels.

A. Regular apricot kernels are kernels that come from apricot pits that have been cracked, and the pits are primarily those that are removed in the drying yard at the time of the cutting and placed out in the sun for drying. And, secondly, in a normal canning operation, where they pit apricots for canning, half canning, they are removed in the canner and likewise placed in the sun for drying.

Those are the two classifications normally for regular apricot kernels as far as operations.

(Testimony of Raymond L. Engell.)

Q. And while we are talking about it, what are steamed apricot kernels?

A. Steamed apricot kernels are derived from pits that, through an operation such as making apricot nectar or preserved apricots, it is necessary to remove the pits from the meat, and in so doing they have to heat the apricot up to various temperatures. I am not familiar with the exact temperature, but it does heat the pit to the point where it affects the kernel and it definitely has a characteristic difference from the regular apricot kernel.

Q. Do regular apricot kernels vary in size, color and texture?

A. They vary in size; not as much in color and texture. [106]

Q. Do the variances depend in part on the locality of production of the apricots?

A. It does have some bearing.

Q. Now, Mr. Engell, is there any well established custom amongst those trading in apricot kernels as to the percentage of broken kernels that is permissible in any delivery of regular apricot kernels?

Mr. O'Connor: If the Court pleases, at this time, for the purpose of the record, I will object to any questions directed to the question of custom and usage on the ground that no proper foundation has been laid so far in this case showing that the defendant in this case was actually regularly in the business of selling—either selling or producing apricot kernels, regular or otherwise; upon the further

(Testimony of Raymond L. Engell.)

ground that the evidence thus far in this case has demonstrated, that, to the contrary, he was new in the business, had no knowledge of the customs and usages of this particular business insofar as it relates to apricot kernels; and upon a third and further ground that the plaintiff in this case at no time relied upon the custom and usage of the trade insofar as this particular custom has been referred to in the questions concerned.

And that has been evident from the testimony and the evidence already in the record; the fact that he demanded that, as a part and parcel of this particular contract, that that particular clause be inserted in the contract. [107]

Mr. Eisner: If the Court please, first of all, counsel is in error in his comprehension of the law, that it is necessary to establish that the party who is dealing in a particular commodity was personally familiar with the general and well established custom of the trade.

When he undertakes to deal in a certain commodity, he is bound by the well established customs of the trade in that commodity, whether he is familiar with the customs or whether he isn't familiar with the customs. And in this case we plead specifically, although probably it would not be essential, the fact of the existence of the custom, and the evidence in this case shows clearly that it was relied upon, and it is a custom whether relied upon or not that would be implied a term of the contract, whether express or implied.

(Testimony of Raymond L. Engell.)

And I am proposing to prove by this witness, as counsel had said no proper foundation has been laid—I don't know of any better prepared or more competent witness to testify to the custom of this trade than the witness on the stand, and I submit, if the Court please, that the question is a perfectly proper one, and I have asked him whether such a custom exists.

The Court: Submit the matter?

Mr. O'Connor: Yes, it is, your Honor.

The Court: The objection will be overruled.

Mr. O'Connor: May it be overruled subject to a motion [108] to strike, your Honor?

The Court: Very well. Let the record so show.

Q. (By Mr. Eisner): Rather than to ask the reporter to go back, I will repeat the question, that might be simpler.

I asked you, Mr. Engell, is there any well established custom amongst those trading in apricot kernels as to the percentage of broken kernels that is permissible in any delivery of regular apricot kernels? A. It is a custom that——

Q. You can answer that question yes or no.

A. Yes.

Q. How long to your knowledge has this custom existed?

A. It has been existing as long as I have been connected with our operation.

Q. And now would you state what that custom is?

(Testimony of Raymond L. Engell.)

A. You mean from the standpoint of the time a sale is made or of the operations?

Q. I mean, is there any custom of the trade pertaining to the percentage of broken kernels that is permissible in any delivery under contract for sale of regular apricot kernels?

A. Well, I can speak from the standpoint of the operations; I do have a certain amount of knowledge as to the sales end, and the contract so specifies in each instance on the face of the contract that it must not exceed by weight five per cent of broken kernels by weight. [109]

Now the time of negotiations or confirmation of sale—it may be made by wire or telegram, and reference to that five per cent is not always in the telegram or wire because it is implied that regular apricot kernels would be shipped with not more than five per cent broken kernels by weight. It is established custom in the industry.

Q. Now, Mr. Engell, in the sale of apricot kernels, your regular apricot kernels, does it frequently occur that a certificate of the California Dried Fruit Association is required by the buyer?

A. The buyer sometimes will require a certification by the California Dried Fruit Association, and likewise the seller will also ask for certification, particularly if it is a water shipment.

Q. I will ask you: Will the Dried Fruit Association of California issue a certificate passing regular apricot kernels in which the percentage of broken kernels exceeds five per cent by weight?

(Testimony of Raymond L. Engell.)

A. To my knowledge, no.

Mr. O'Connor: Just a minute, please. I will object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues of the matters before the Court in the pleadings and the theory on which the case has been tied up to the present moment.

Mr. Eisner: It is merely cumulative evidence of the [110] question, if the Court please.

The Court: For that limited purpose I will allow it. The objection will be overruled.

A. There have been instances when they have refused to issue a certification when it exceeds five per cent.

Q. (By Mr. Eisner): Mr. Engell, will you tell us how in actual practice and production the percentage of broken kernels is controlled?

A. It is controlled at the time the kernels are cracked—the pits are cracked, and the kernels are removed from the broken shell.

The kernels are separated from the shell by means of, in our particular instance, a flotation method, where the kernels are floated out and the shells go to the bottom and are taken out by a drag chain.

The kernels then proceed to a drying unit which dries the kernels down to a certain moisture content, and then they go over a shaker which has a perforation with holes of various sizes to remove small pieces of kernel, and from there they go on to a sorting belt where they remove broken kernels

(Testimony of Raymond L. Engell.)

that it is felt will—in order to bring the particular pack within the five per cent.

And that is checked periodically to be sure that it meets the requirement of five per cent.

Q. In other words, the percentage of broken kernels is then, [111] you might say, mechanically controlled; is that correct?

A. It is mechanical, generally speaking, but the final operation is done manually to get it within the five per cent, because the broken kernels are kernels that may not always go through a certain size screen.

Q. In other words, if any get through, then they are manually eliminated by taking them off the belt?

A. That is correct.

Q. As the belt passes by those who are acting upon it?

A. That is correct.

Q. Mr. Engell, what are broken apricot kernels generally used for in this country?

A. They are generally used for oil extraction or pressing of oil.

Q. Are they marketed at a low price compared with regular kernels?

A. Yes.

Q. Mr. Engell, can you tell us what the market price of regular apricot kernels, f.o.b. West Coast dock, was on or about the first day of September, 1955?

A. May I refer to a memorandum of sale at approximately that date?

Q. Yes, you may.

The Witness: I am not familiar—

(Testimony of Raymond L. Engell.)

Mr. O'Connor: May I see the memorandum, please? [112]

A. September 1st, 1955. I have a sale made here on August 31st, which was for 17½ cents f.o.b. dock.

Q. (By Mr. Eisner): 17½ cents? A. Yes.

Q. Then the California Packing Corporation actually made a sale at that time at 17½ cents?

A. Yes.

Q. In the sales made at that price, 17½ cents, on August 31, 1955, did the tolerance limit of not more than five per cent by weight of broken kernels apply? A. Yes.

Q. After September 1, 1955, was there a progressive increase in the market price of regular apricot kernels?

A. There was a progressive increase, although we did not participate in that increase in our shop during the rise. We were acquainted with the marketed change, but our particular situation was we were just waiting to see where it went rather than——

Q. Irrespective of whether you sold or didn't sell, if you are familiar, or kept yourself familiar with the market price, will you be good enough to tell us whether there was such a progressive increase in market price after September 1, 1955.

A. I think—I can tell you there was a progressive increase. I can indicate a memorandum of sale that was made on steamed apricot kernels, be-

(Testimony of Raymond L. Engell.)

cause they are sold generally at a differential, [113] slightly less than regulars.

Q. Yes?

A. But a sale was made of steamed apricot kernels during that period of September which I can make reference to. I think, in fact, it was in October.

I would like to make this reference, if you will permit, that on August 31st, when the sale of regular kernels was made at $17\frac{1}{2}$ cents, steamed apricot kernels were sold at $14\frac{1}{2}$ cents, a differential of approximately 3 cents.

On October 12, 1955, steamed apricot kernels were sold—I have a sale here representing 22 cents per pound, which indicates that there was a gradual increase that had been taking place.

Q. Mr. Engell, can you tell us what the market price of regular apricot kernels, f.o.b. West Coast dock, was on or shortly prior to November 16, 1955?

A. I don't have any sales made domestically, other than one made on November 8, 1955, which was for 40 cents per pound dock.

Q. In other words, on November 8, 1955, the sale price was 40 cents f.o.b. dock. Do you have any information pertaining to sales any closer to November 16, 1955 than November 8th?

A. I have a record that was given to me by our sales department on November 11th, sale made into Sweden, which was an export shipment, f.o.b. dock at 42 cents, and one on [114] November 23rd, like-

(Testimony of Raymond L. Engell.)

wise made into Sweden, at a price of 42 cents f.o.b. dock.

Q. 42 cents f.o.b. dock? A. Yes.

Q. Let me ask you: In the case of those sales also which you refer to, were all those sales made with the same limitation of not exceeding five per cent by weight of broken kernels? A. Yes.

Q. Mr. Engell, did you as plant manager, or in your position at California Packing Corporation at any time during 1955 receive notification that you personally would be contacted by Sunset-Sternau Food Company with respect to the cracking of apricot pits for that company?

A. Well, during the period—during the month of October, Mr. Glenny, our sales manager, informed me that I would be contacted by telephone from Sunset-Sternau, some representative of Sunset-Sternau, for the purpose of ascertaining whether we could crack some apricot pits on a toll cracking basis.

Q. And was California Packing Corporation ready and willing to crack upon a toll basis?

A. Yes.

Q. Were you ever contacted at any time by Sunset-Sternau Food Company or anyone on their behalf pertaining to the cracking of apricot kernels? [115]

A. I was not contacted directly by Sunset-Sternau, or, in fact, I do not know whether the person was a party or connected with Sunset-Sternau, but a gentleman by the name of Rudy

(Testimony of Raymond L. Engell.)

Bonzi of Modesto called me on the telephone and asked me if it was possible——

Q. When did he contact you, Mr. Engell?

A. It was somewhere around the middle of November.

Q. 1955? A. 1955, yes.

Q. And did he contact you—I interrupted you.

A. He contacted me by telephone, and I made arrangements to go down to Modesto and meet with him the following day.

Q. Did you actually go to Modesto?

A. I did.

Q. Did you go to the premises of Mr. Bonzi?

A. I did.

Q. Will you state what you saw there pertaining to apricot pits?

Mr. O'Connor: If the Court please, I will object to this line of questioning as being incompetent, irrelevant and immaterial and not being within the issues presented by the pleadings in this case or the issues presented to the Court thus far. What this gentleman's relationship was with Mr. Bonzi is entirely distinguishable from any dealings between the American Almond Company and Sunset-Sternau Company. [116]

Mr. Eisner: I am not offering this, if the Court please, for the purpose of proving any arrangement between California Packing Corporation and Mr. Bonzi. I am offering it to establish that Mr. Bonzi at this time when this witness saw him, had the uncracked apricot pits strewn upon his ground

(Testimony of Raymond L. Engell.)

and they were there, and that there was a conversation pertaining to the cracking of these apricot pits by the California Packing Corporation. That is as far as I propose to go.

Mr. O'Connor: Then I will object on the further ground that it would be hearsay as to this defendant, if the Court please, and not binding upon the defendant.

The Court: For the limited purpose of the offer, I will allow it. The objection will be overruled.

Mr. O'Connor: Subject to a motion to strike.

Q. (By Mr. Eisner): Mr. Engell, to save time, did you then go to Modesto to the premises of Mr. Bonzi? A. I went to the premises, yes.

Q. And will you state what you saw there, if anything, pertaining to apricot pits?

Mr. O'Connor: May it please the Court, so I won't be interrupting, may it be understood that my objections go to the whole line of questioning?

The Court: Let the record so show.

Mr. O'Connor: Thank you.

A. I went to the office of Mr. Bonzi, and there was no one [117] there, so I proceeded to walk out into the grounds, and Mr. Bonzi was out there.

I talked to him and surrounding us was a considerable quantity of apricot pits, strewn out over the ground.

Q. (By Mr. Eisner): Did you have any conversation with Mr. Bonzi pertaining to cracking the apricot pits?

A. I talked to Mr. Bonzi. I said "I can."

(Testimony of Raymond L. Engell.)

Q. I just asked you if you had it; I am not going to ask you the conversation.

Did you have conversation?

A. Oh, yes, yes.

Q. Did you thereafter hear from Mr. Bonzi as to whether or not he wanted the California Packing Corporation to crack the pits?

A. I heard from him, it was probably two or three days thereafter, by telephone, to the effect that he was not interested at that time in having us crack the pits.

Q. Mr. Engell, amongst those trading in natural commodities, such as handled by the California Packing Corporation, and with which you are familiar, is there such a thing as what is known as a type sample?

A. In our particular shop we consider a type sample a sample representing commodities and dried fruits as to regular grades. Likewise a type sample of regular apricot kernels would be a sample to show the quality of the merchandise or commodity, [118] and not anything else, other than to give a buyer an opportunity to see what the regular type of fruit or commodity it might be that he was negotiating.

Q. Would such a sample, in your opinion, Mr. Engell, of apricot kernels, furnished for the purpose for which you have stated, have anything to do with the percentage of broken kernels that would be present in the delivery?

A. It would not.

(Testimony of Raymond L. Engell.)

Q. I am going to ask that you assume that a producer of apricot kernels had a lot of uncracked kernels sufficient to produce 75 tons of kernels, and assume further that the producer cracked just enough of the pits to furnish a sample of kernels to a proposed buyer, leaving the bulk of the pits uncracked; in your opinion, would a sample so furnished be a type sample such as you have indicated to represent the quality of the kernels?

A. I would say it would be.

Q. And let us assume that in such a sample that was furnished, there were no broken kernels whatsoever in the sample that was furnished, in your opinion, would this seller have the right to deliver kernels in which the percentage of broken kernels did not exceed five per cent by weight?

Mr. O'Connor: Just a moment. If the Court pleases, I will submit that that is not a proper type of hypothetical question and calls for the opinion and conclusion of the witness upon the subject matter of whether or not a person [119] selling had the right to do a certain thing.

Mr. Eisner: The witness is qualified certainly as an expert and the question calls for his opinion.

In the case of an expert witness who is qualified, you can ask for his opinion.

The Court: I will allow it, subject to a motion to strike, and overrule your objection.

Mr. Eisner: You may answer.

A. I would say it would be implied that there

(Testimony of Raymond L. Engell.)

would be five per cent tolerance permitted for broken kernels.

The Court: Is this a sample of 20 sacks?

Mr. Eisner: No. I mean, if the Court please, this witness is testifying——

The Court: I mean this sample that was sent on.

Mr. Eisner: The sample that was sent on was 200 pounds.

The Court: 200 pounds. I wanted to refresh my memory.

Mr. Eisner: Two sacks that were cracked for this particular purpose.

Q. And in the same way, Mr. Engell, if there were more than five per cent broken kernels in the sample, the type sample that was submitted, would the buyer be entitled to receive kernels with no more than five per cent broken kernels?

A. Correct.

Mr. Eisner: That is all. [120]

Cross Examination

Q. (By Mr. O'Connor): Mr. Engell, when more than five per cent by weight of broken kernels occurs in a delivery of say a one hundred pound bag of kernels, does that seriously affect the value of those kernels? A. I would say it would, yes.

Q. Well, if there was five per cent by weight of broken kernels in a one hundred pound bag that would mean, would it not, Mr. Engell, that there would be five pounds of that bag by weight that would consist of broken kernels?

(Testimony of Raymond L. Engell.)

A. Right.

Q. Am I right on that? A. Yes.

Q. And if there were ten per cent by weight of broken kernels, of course the value of that bag would be diminished, would it not? In other words, you couldn't use the broken kernels?

A. It depends on the operation, yes, I would say it would.

Q. It would diminish the value, would it not?

A. Yes.

Q. In connection with that, I think you had a contract there, Mr. Engell, did you?

A. I have a memorandum of sale.

Q. This five per cent clause, that the merchandise shall not exceed five per cent by weight broken kernels, is a standard clause in your contracts of California Packing Company; isn't [121] that correct?

A. I will have to answer that: It is not a printed clause; it is a qualified clause that is added on the contract.

The Court: What was that answer?

A. I say it is not a printed clause. It is a clause that is qualified and entered on the face of the contract.

Q. (By Mr. O'Connor): Would you mind showing me that contract you referred to, Mr. Engell?

A. This is the memorandum of sale from which the contract is written up.

Q. Yes. And this contract, which was a sale to American Almond Products under date of Aug-

(Testimony of Raymond L. Engell.)

ust 31, 1955, does have the qualifying phrase "Not exceeding five per cent by weight broken," doesn't it?

A. That is correct.

Q. That is the standard clause, and buyers and sellers generally agree upon that, do they not; they reduce it to the contract; they put it in the contract?

A. That is correct.

Q. Because that contract form that you have there is used for other products, is it not, that California Packing Corporation sells, isn't that so?

A. Yes.

Q. So that if a delivery exceeded five per cent and went as high as ten and fifteen per cent by weight of broken kernels, [122] the buyer normally would reject it, would he not?

A. Correct.

Q. In other words, if it was ten per cent in a hundred pound bag he would be paying for ten pounds of broken kernels at a kernel price?

A. Yes.

Q. If the price were seventeen and a half cents per pound he would be paying for ten pounds that are of little or no value to him; isn't that correct?

A. If he accepted delivery, he would.

Q. And where a sample is submitted to a buyer and it contains more than five per cent by weight of broken kernels, the buyer is put upon notice of that fact; isn't he?

A. I would say it this way: That if a sample contained more and it was a type sample from our particular shop, the type sample would not necessarily have to comply with the five per cent; it

(Testimony of Raymond L. Engell.)

could be one or five or ten. It is implied that the shipment—if the sale is consummated, the shipment would be within five per cent.

Q. Would have to comply within the five per cent?

A. We use type samples on other commodities in our business that represent a regular grade of fruit.

Q. Mr. Engell, there is a regular business done in apricot kernels, isn't there, year in and year out during all of the years you have been at California Packing Corporation? [123]

A. Yes.

Q. In normal years, the average year, let us say, is there much variance in price in apricot kernels during the course of a year?

Mr. Eisner: That is objected to as being irrelevant, incompetent and immaterial.

Mr. O'Connor: It is preliminary, if the Court please.

The Court: I will allow it subject to a motion to strike.

A. I would say there is a variance in price throughout the—at certain times there has been.

Q. (By Mr. O'Connor): What is the average variance in price of apricot kernels in average years?

Mr. Eisner: That is objected to—same objection, if the Court please.

Mr. O'Connor: Preliminary, if the Court please,

(Testimony of Raymond L. Engell.)

bearing upon the claim of damage in this case and subject to being connected up.

The Court: I will allow it subject to a motion to strike. Being a farmer myself, we get a frosty year or what not. We are in the realm of speculation which can't possibly spell out very much legally.

Now we will proceed with that admonition.

A. I would say that there is a variance because of supply depending upon the crop from year to year. The crop may [124-125] sometimes—I will put it this way: The market may open up, and before the crop is completely harvested it will be determined that there is a shorter crop and the market will strengthen accordingly, which is common in other commodities likewise in our business.

Q. (By Mr. O'Connor): What was the variance in the price range of regular apricot kernels during the year 1954, the year preceding '55?

A. That I couldn't answer you; I haven't looked up the records on that.

Q. What was the variance in price of regular apricot kernels during the year 1953?

A. Likewise I do not have the information before me, but I do know that it has varied some years.

Q. Mr. Engell, what was the variance in price of regular apricot kernels during the year 1956?

A. The variance in 1956 to my recollection is varied from—on regular apricot kernels?

Q. Regulars, yes.

(Testimony of Raymond L. Engell.)

A. From thirty-eight cents a pound to close to at least fifty cents a pound.

Q. Do you know of the firm of Sewell Brown & Company? A. Yes.

Q. Where are they located?

A. A few miles out of San Jose. [126]

Q. Are they engaged in the business of selling and producing apricot kernels? A. Yes.

Q. Were they in the year 1955? A. Yes.

Q. Did they have a fire down in their plant in the year 1955?

A. They had a fire there the latter part of September, I think somewhere around the 20th, or in that neighborhood.

Q. And were you familiar with market conditions of apricot kernels at that time?

A. I was, yes.

Q. Did the fire in question with the destruction of their supply of apricot kernels affect the price of the market?

A. As I recollect it, the fire—approximately four hundred tons of apricot kernels would be removed from the market because of the fire, and consequently a shortage developed in the market.

Q. A shortage of apricot kernels?

A. A shortage of apricot kernels.

Q. A shortage developed and then the regular laws of supply and demand went into effect and the price of apricot kernels rose thereafter?

A. That is correct.

Q. So it was a factor and a vital factor in this

(Testimony of Raymond L. Engell.)

area [127] regarding the price of apricot kernels, was it not, Mr. Engell?

A. It was a factor. There was one other factor that had a determination on the price advancing, was the European almond crop was not in the normal supply, and the demand in Europe took a considerable upward trend which likewise increased the price because of supply.

Q. And so far as domestically is concerned here in California, the Sewell Brown fire definitely caused an upward swing in the market for apricot kernels, didn't it? A. Yes.

Q. By the way, did you have any other contracts for the sale of kernels to the American Almond Products during the year 1955 other than that one sale of August 31st? A. Yes.

Q. When else did you sell to them?

A. August 26, 1955, there was a sale at seventeen and a half cents; August 30, 1955, another sale at seventeen and one-half cents.

Q. Were there any sales after this date to American Almond Products Company, Mr. Engell?

Mr. Eisner: In 1955?

Mr. O'Connor: Yes.

A. The only one I have referred to already; that was the one on August 31st.

Q. Yes, August 31st. [128]

A. I have no others until November 8th; I think that is in the record, at forty cents a pound.

The Court: It is in the record.

(Testimony of Raymond L. Engell.)

Q. (By Mr. O'Connor): Yes, that is November 8 and that likewise contains the clause "Not exceeding five per cent by weight broken?"

A. That's right.

Q. As a matter of fact, all three orders of all three contracts contain that clause, do they not?

A. Yes, sir.

Q. And those were all three contracts with American Almond Company?

A. That is correct.

Q. What would you say the variance was in 1954 in the price of apricot kernels that you delivered?

A. I said I did not have that information here. I have recollection—I know there were years when there have been upward fluctuations, but I can't testify that '54 was one of those years.

Q. Did you ever have any carry-over of apricot kernels in any years?

A. There have been some years, yes.

Mr. O'Connor: I have no further question, your Honor.

The Court: I was about to take a recess.

Mr. Eisner: All right; very well, your Honor.

The Court: I would like you to get through with this witness so he can go and attend to his business.

Mr. Eisner: I just have one or two questions.

The Court: That is the reason I called your attention to the fact.

(Testimony of Raymond L. Engell.)

Redirect Examination

Q. (By Mr. Eisner): Mr. Engell, counsel has called your attention to, I believe, three contracts with American Almond Products Company, two at seventeen and a half cents and one at forty cents. I will ask you whether the California Packing Corporation delivered all of the regular kernels called for by these contracts at the prices specified in the contracts.

A. To my knowledge they have been.

Q. Now, Mr. Engell, you testified that it is the practice, and I think your documents will show, for California Packing Corporation to expressly include in its contracts the tolerance of five per cent limitation of broken kernels by weight. Whether or not such a clause is expressly included in the contract, Mr. Engell, is it a fact that the same tolerance is implied whether expressed or unexpressed.

A. That is correct.

The Court: You may be excused.

Mr. Eisner: That is all.

Mr. O'Connor: One question, may I ask it, your Honor?

The Court: You may. [130]

Recross Examination

Q. (By Mr. O'Connor): Mr. Engell, was the clause put in these particular contracts with American Almond at their request?

A. It is a common procedure and a customary practice to put the clause in because it is not printed in the contract.

(Testimony of Raymond L. Engell.)

Q. It is common procedure and customary practice to put that clause in a contract?

A. It is accepted by the industry in all dealings that we make.

Q. And it is the customary practice to put it into the written contract; is that correct? The reporter has to hear your answer.

A. Yes.

Mr. O'Connor: Thank you.

Further Redirect Examination

Q. (By Mr. Eisner): Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers & Company, such as Sewell Brown & Company, to expressly include such a tolerance clause, or to let it be implied?

Mr. O'Connor: Just a moment, if the Court please. That is asking the witness to qualify himself as having knowledge of a particular trade practice of other companies and he has [131] not been qualified as having such knowledge.

The Court: If he knows, he may answer.

A. I know that other companies do use that clause.

Q. (By Mr. Eisner): Do they include it or do they not include it—I mean expressly?

A. I would say they include it.

Mr. O'Connor: I will withdraw the objection, your Honor.

Q. (By Mr. Eisner): Are you personally fa-

(Testimony of Raymond L. Engell.)

miliar with whether or not Rosenberg Brothers & Company expressly include the clause?

Mr. O'Connor: Just a minute.

A. That I couldn't answer correctly, other than what knowledge I have gained through association with the sales department to the effect that other companies use the five per cent broken clause.

Mr. Eisner: That is all.

Mr. O'Connor: Thank you. [131-a]

The Court: We will take a recess.

(Recess.)

Mr. Eisner: Mr. Ehrenfeld, would you take the stand, please?

FERDENAND EHRENFELD

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

The Court: What is your full name?

A. Ferdenand Ehrenfeld.

The Court: Where do you live?

A. San Francisco.

The Court: What is the address?

A. 1360 Montgomery.

The Court: 1360 Montgomery Street?

A. That is right.

The Court: Your business or occupation?

A. I have been with Rosenberg's for about 40 years.

The Court: What?

A. I have been with Rosenberg about 40 years.

The Court: In what capacity?

(Testimony of Ferdinand Ehrenfeld.)

A. First as export—I started working for them; I gradually became export manager, then manager, and the last few years I have been active consultant.

The Court: What is the nature of your work? What do you do? [132]

A. At present I keep in contact with the general conduct of the business, and whereas I don't do much detail work, I do know pretty well what is going on, particularly in sales.

The Court: I didn't make very much headway; I will turn him over to you.

Direct Examination

Q. (By Mr. Eisner): Mr. Ehrenfeld, you stated that you have been associated with Rosenberg Bros. and Company for 40 years? A. About 40 years.

Q. What is the business of Rosenberg Bros. and Company?

A. Mainly the buying, packing and selling of dried fruit and nuts, including such nuts as apricot kernels.

Q. And has it been engaged in that business during all the period that you have been associated with the company? A. It has.

Q. And is part of its business in producing and selling apricot kernels?

A. In buying them from the growers and cracking them and selling them.

Q. Would you say that Rosenberg Bros. and Company is probably the largest producer and seller of apricot kernels?

(Testimony of Ferdinand Ehrenfeld.)

A. I think usually we have handled more than any one of our competitors.

Q. Mr. Ehrenfeld, we have already, I believe, had sufficient [133] testimony in the record of the various classes of apricot kernels, regular, steamed and sulphured, with which you are familiar?

A. Yes, I am.

Q. Is there any well established custom of the trade amongst those trading in apricot kernels as to the percentage of broken kernels permissible in any delivery of regular apricot kernels?

Mr. O'Connor: Just a moment, if the Court please; I make the same objection which I have urged heretofore to the introduction of evidence in behalf of custom and trade usage insofar as apricot kernels are concerned, as I made to Mr. Engell's testimony, namely, number one, there is no proof of reliance by the plaintiff upon custom or usage insofar as the defendant is concerned; there is no evidence that the defendant was regularly engaged in the business of selling apricot kernels, or buying them, or was aware of the custom and usage of the trade at the time of this alleged transaction.

The Court: Do you have in mind the foundation for that testimony?

Mr. O'Connor: Yes, I do, if the Court please.

The Court: Lay a better foundation, if you can.

Q. (By Mr. Eisner): Mr. Ehrenfeld, are you familiar with the trading in apricot kernels?

A. Yes, I am.

(Testimony of Ferdinand Ehrenfeld.)

Q. Have you been familiar with it during all the period in [134] which you have been associated with Rosenberg Bros.?

A. For by far the major part of it.

Q. And are you familiar and do you keep posted with the market prices of apricot kernels?

A. I am.

Q. I will ask you again the question to which objection has been made.

Mr. Eisner: Will the reporter kindly read the question?

The Court: I suggest you reframe your question.

Mr. Eisner: All right, I will repeat it.

Q. Is there any well established custom of the trade amongst those trading in apricot kernels as to the percentage of broken kernels permissible in any delivery of regular apricot kernels?

A. Yes, there is.

Mr. O'Connor: Just a moment. Now, if the Court please, if the Court desires, I will just refer back to my objection to the testimony of Mr. Engell and adopt my objection to his testimony on custom.

The Court: You have got your running objection to custom. The record so shows.

Mr. O'Connor: Thank you.

Q. (By Mr. Eisner): You have answer "Yes?"

A. Yes, sir.

Q. I will ask you, how long has this custom to your knowledge existed?

A. As long as I know anything about apricot

(Testimony of Ferdinand Ehrenfeld.)

kernels, which [135] is, I would say, moderately, 30 years.

Q. That would be for the past 30 years?

A. Yes.

Q. That that general custom has existed?

A. Has existed.

Q. Will you please state what the custom is?

A. Regular kernels are not supposed to contain more than five per cent broken.

Q. Is that by weight? A. By weight.

Q. Let me ask you, Mr. Ehrenfeld, does this custom apply in the case of all sales of regular apricot kernels without setting forth the qualifications in the contract? A. It does.

Q. What is the practice of Rosenberg Bros. and Company, whether in mentioning or not mentioning the percentage of tolerance of broken kernels in its contracts of sale of regular apricot kernels in the domestic market?

Mr. O'Connor: If the Court pleases, to that question I raise the objection that it is hearsay so far as this defendant is concerned; it is incompetent, irrelevant and immaterial to the issues before the Court in this particular case what the practice of Rosenberg is or is not.

The Court: Do you know what the practice is?

A. I do. [136]

The Court: The objection is overruled. Proceed.

The Witness: I looked up quite a number of contracts before I came over here, and I found that

(Testimony of Ferdinand Ehrenfeld.)

some of them do show the stipulation not over five per cent broken, and others do not. They, however, read "regular kernels," and that seems to have satisfied both the buyer and the seller, and under such contract I am expected to make a delivery that does not exceed five per cent broken.

Q. (By Mr. Eisner): In other words, you have found in some instances Rosenberg Bros. and Company does include an expression of the clause, and in some cases it does not; is that correct?

A. I might supplement this by saying that frequently the contracts are not made in the head office; they are made by some of the agents. They send them in, and some put it in and others don't, and on the contracts that we make in the office, I happened to find that most of them do read "for regular kernels."

Q. And make no mention——

A. And make no mention.

Q. ——of the tolerance? A. That is correct.

Mr. Eisner: I am going to show this witness this contract. You have already seen it.

Mr. O'Connor: Yes. [137]

Q. (By Mr. Eisner): I show you this contract, Mr. Ehrenfeld, dated September 23, 1955, with American Almond Products Company, and ask you if this is a contract made by Rosenberg Bros. and Company with American Almond Products Company for sale of regular apricot kernels?

A. It is such a contract.

Q. And I call your attention to the fact that this

(Testimony of Ferdenand Ehrenfeld.)

contract makes no mention of any percentage of broken kernels; is that correct?

A. That is correct.

Q. And whether it mentions that or not, that tolerance would be implied, is that correct?

A. It would be implied.

Mr. Eisner: We offer this contract in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 43 admitted and filed in evidence.

(The contract referred to was marked Plaintiff's Exhibit No. 43 in evidence.)

Mr. O'Connor: My objection likewise goes to this contract being in evidence, your Honor.

The Court: You have a running objection.

Q. (By Mr. Eisner): Mr. Ehrenfeld, are export sales of apricot kernels usually accompanied by certificates of quality issued by the Dried Fruit Association of California? [138]

Mr. O'Connor: If the Court please, same objection, incompetent, irrelevant and immaterial, calls for matter which is not at issue in this action, and is hearsay as far as this defendant is concerned and not binding upon him.

Mr. Eisner: It is merely, as I stated before, cumulative evidence of this custom, if the Court please.

The Court: For that limited purpose, I will allow it.

The Witness: May I ask you to repeat the question?

(Testimony of Ferdenand Ehrenfeld.)

Q. (By Mr. Eisner): Yes. I asked you: Are export sales of apricot kernels usually accompanied by certificates of quality issued by the Dried Fruit Association of California?

A. Usually export sales are and domestic sales made for steamer shipment.

Q. Do you know whether or not the Dried Fruit Association of California will issue a certificate of quality for regular apricot kernels that exceed five per cent of broken kernels by weight?

Mr. O'Connor: Same objection, if the Court please, for the record.

The Court: Same ruling.

A. They will not.

Q. (By Mr. Eisner): Mr. Ehrenfeld, do you know what practice is followed in the plants of Rosenberg Bros. and Company with reference to grading regular apricot kernels, so as to control the percentage of broken kernels? [139]

A. We use mechanical means, such as screening and blasting, air blasting, and then, dependent upon the percentage of brokens still in the delivery that is being tested right along, we supplement that by hand picking when need be.

Q. What market is there in the United States for broken kernels?

A. For the pressing of oil.

Q. What difference in price is there in the United States between broken kernels and regular kernels at any given time, approximately?

A. There is a substantial difference in price.

(Testimony of Ferdinand Ehrenfeld.)

Q. Suppose that regular kernels are selling at 18 cents, what would broken kernels, in your opinion, sell at?

A. I would say, depending on the condition of the broken kernels, the percentage of dirt they may have, or shells, all the way from 4, 5 to 7 cents.

Q. 4 to 7 cents?

A. That is as close as I can answer.

Q. Mr. Ehrenfeld, did Rosenberg Bros. and Company make any sales of regular apricot kernels about the first day of September, 1955?

A. May I be permitted to look at records?

Q. Yes.

A. We made a sale on August 29, 1955.

Mr. O'Connor: If the Court please, apparently we are [140] getting into a line of interrogation of this witness as to what sales were made by Rosenberg Bros. of kernels during a specified period of time.

The witness has not been qualified as to whether or not at that time he was in charge of the department selling apricot kernels, for Rosenberg Bros., and whether he is familiar personally with the records.

The Court: Are you familiar with the records?

A. I am completely familiar with the records, and I checked it over personally. And I was very familiar with the operations of the firm all during this period, particularly sales.

Mr. O'Connor: May it please the Court, I see the witness has a paper in his hand, and I assume

(Testimony of Ferdinand Ehrenfeld.)

from the statement of the witness he is obviously eager to testify.

Mr. Eisner: Now, just a moment.

Mr. O'Connor: And I assume that that contains an excerpt from the records of Rosenberg Bros., and if that is so——

The Court: What is this?

A. This is a record I made of the various sales of kernels made on the basis of contracts from August 29, '55, to November 16, '55, and the evidence of each sale is available to the Court if it desires.

The Court: When was it made?

A. Last week.

Mr. O'Connor: May it please the Court, my objection to [141] this testimony——

The Court: There is nothing before the Court at this time. Let us proceed.

Q. (By Mr. Eisner): I asked you, Mr. Ehrenfeld, whether you made any sales about the first day of September, 1955.

A. The closest day that I could find is August 29, '55, and another sale—the next sale on September 6th.

Q. What was the sale?

Mr. O'Connor: Again, may it please the Court, I submit that the witness cannot refresh his recollection from a document which is not the best evidence. The best evidence is the records themselves, not this man's excerpts.

(Testimony of Ferdenand Ehrenfeld.)

The Court: He is entitled to them if he presses it.

Mr. Eisner: If he wants this witness to go back and bring the records of these sales—in other words, the witness has made a summary from the records, and if he wants the original records produced here, we will produce them for him.

The Court: Very well; with that understanding, you may proceed.

Mr. O'Connor: I do press it.

Mr. Eisner: All right.

Q. Now, Mr. Ehrenfeld, I will ask you if you can tell us of your experience and of your knowledge of the market condition, what was the market price of regular apricot kernels f.o.b. [142] dock San Francisco on or about the first day of September, 1955? A. 18 cents a pound.

Mr. O'Connor: May it please the Court, the witness is again testifying from a record which is not the best record.

The Court: Counsel assures me that he will bring up the original records in the interests of time.

The Witness: I also assured you the evidence is available. This was taken from sales promotion by me personally.

Mr. O'Connor: I will test him out on cross-examination.

The Court: All right, proceed.

Q. (By Mr. Eisner): Mr. Ehrenfeld, irrespec-

(Testimony of Ferdenand Ehrenfeld.)

tive of these sales, are you familiar with the market value, the prices? A. I am.

Q. And according to your testimony, from your knowledge, was 18 cents the prevailing market price for regular apricot kernels f.o.b. dock San Francisco on or about the first day of September, 1955?

A. The exact date I have here is August 29th.

Q. Was this the price for regular apricot kernels, of five per cent, not exceeding five per cent of broken kernels? A. It was.

Q. Mr. Ehrenfeld, after the 1st day of September, 1955, and between that date and the 16th day of November, 1955, can you state whether or not the market price of regular [143] apricot kernels increased? A. Yes, it did increase.

Q. Can you tell us approximately how that market price increased over that period, indicating the development?

A. Well, I can give you the dates of a number of sales made during this period; I can produce evidence afterwards if required.

Q. Yes.

A. On August 29th it sold at 18 cents; on September 17th at 20 cents; September 27th and 29th at 28 cents; October 25th at 31.2 cents; October 31st at 40 cents; November 14th at 41 cents; November 16th at 43 cents, per pound, f.o.b. dock.

Q. And in your opinion were those prices the fair market price of regular apricot kernels at these dates? A. Yes, they were.

(Testimony of Ferdenand Ehrenfeld.)

Q. And on November 16, 1955, Rosenberg Bros. and Company actually sold regular apricot kernels f.o.b. dock at 43 cents; is that correct?

A. We did.

The Court: I am allowing this testimony to go in with the understanding that you will produce these contracts.

Mr. Eisner: Yes.

Would it be satisfactory, counsel, without bringing this witness back, if he delivers these contracts to me and I can submit them to you, or would you like to go down to Rosenberg Bros. to see them?

Mr. O'Connor: Let's wait until we finish the cross examination of Mr. Ehrenfeld and something may develop.

Mr. Eisner: All right.

The Court: Do I understand that you are retired from Rosenberg's?

A. No, I am a consultant on the permanent wage roll and I go in about five or six hours a day.

Q. (By the Court): You are still on the pay-roll, are you?

A. Yes.

The Court: That is important. Proceed.

The Witness: I think so, too.

Q. (By Mr. Eisner): Mr. Ehrenfeld, is it customary in the trade of merchandise such as is handled by Rosenberg Bros. and Company, dried fruits, nuts, including apricot kernels, to furnish what are known as type samples?

A. It is done frequently.

(Testimony of Ferdenand Ehrenfeld.)

Q. And what are type samples?

A. They are to show the buyer the general characteristics and quality of the particular article, whether it is fruit or nuts or anything else.

Q. Mr. Ehrenfeld, if a type sample of apricot kernels is furnished to the buyer, would that, in your opinion, have anything to do with the percentage of broken kernels that would be present in the delivery? [145]

A. It would not.

Q. I am going to ask you to assume that a producer of apricot kernels had a lot of uncracked pits sufficient to produce 75 tons of kernels, and assume that the producer cracked just enough pits to furnish a sample of kernels to a proposed buyer, leaving the bulk of the pits uncracked, in your opinion would a sample so furnished be a type sample to indicate to the buyer the quality of the kernels?

A. It would be; that is the intent of it.

Mr. Eisner: That is all.

Cross Examination

Q. (By Mr. O'Connor): Mr. Ehrenfeld, I think you have testified on your direct examination you are familiar with the market price of apricot kernels; is that correct?

A. That is correct.

Q. That is part of your job at Rosenberg Bros., is it, sir?

A. It is part of my job of keeping familiar with the market prices, current business, yes.

Q. Mr. Ehrenfeld, can you tell me what the

(Testimony of Ferdinand Ehrenfeld.)

market price for apricot kernels, regular apricot kernels, was during the year 1954?

A. I cannot.

Q. Were you working for Rosenberg Bros. at that time?

A. If I were to depend on my memory of what happened in '54 I would be in a bad fix; I couldn't. I could give it to [146] you from the records. I can give it to you for a more recent date, but I couldn't give it to you for that period; I would have to look it up.

Q. Can you give me at this time——

A. Yes, I can.

Q. Wait until I finish the question, sir.

Can you give me from your recollection the market price of regular apricot kernels during the year 1953? A. No, I cannot.

Q. Can you give me from your memory the market price or prices of apricot kernels during the year 1956? A. Yes, I can.

Q. And did you refresh your memory on the 1956 prices before you came to court?

A. It's current every day; there is still some business being done.

Q. There is still business being done?

A. That's right.

Q. And what is the price of apricot kernels today?

A. The last quotation I heard it was 43 cents. It was up to 50 and 52.

Q. What year was the lowest——

(Testimony of Ferdinand Ehrenfeld.)

A. It is a very fluctuating commodity.

Q. What was the lowest and the highest range of prices?

A. I would say from 38 to 52 or 52½. [147]

Q. That would be more or less the normal variance, would it?

A. You have a different price level; I think of percentage it would be the normal range, but without being able to add up and give you the figures for the years preceding 1955, I have seen fluctuations of 50 to 60 per cent in the rate of kernels during the season because it is a peculiar class of commodity.

Q. Mr. Ehrenfeld, what year did the price fluctuate 60 per cent?

A. I am speaking from memory; I think I should be able to find out for you. I said 50 to 60 per cent. I believe it can be found.

Q. What was the fluctuation in 1953?

A. That I can't tell you.

Q. What was the fluctuation in 1954?

A. I cannot tell you. I am speaking on rough memory over many years, and those things stand out to you and there was a fluctuation.

Q. Are you in charge of the sales of apricot kernels in your organization?

A. I have contact with every more important sale that is made in the firm, and I know it in general before it is made and after it is made.

Q. How much by volume of sales did Rosenberg

(Testimony of Ferdinand Ehrenfeld.)

Bros. make with reference with regular apricot kernels during the year 1955? [148]

A. You mean total volume?

Q. Yes. A. Of sales?

Q. Yes. A. During the season '55?

Q. Yes.

A. I would remind you I am guessing, because you asked me a question, so you have to give me a certain leeway. I would imagine during that season Rosenberg sold close to a thousand tons of all kinds of kernels.

Q. Does that include the steamed?

A. It would.

Q. It did; how much regular? A. What?

Q. How much of regular apricot kernels were sold?

A. That again is roughly. I would say the relation at that time may have been about three to one, maybe two to one or three to one, between regular and steamed kernels.

Q. That is in tons or pounds? A. Tons.

Q. How much was sold during the current year '56-'57 of regular apricot kernels?

A. There was a smaller apricot crop and consequently I would say this season Rosenberg's should handle of kernels bought [149] and sold in their own name, between five and six hundred tons, of all types combined.

Q. Mr. Ehrenfeld, what does that five per cent clause mean by way of weight of broken kernels?

(Testimony of Ferdinand Ehrenfeld.)

A. Well, there are 95 per cent of the whole kernels and the others can be broken.

Q. And if it exceeds five per cent by any appreciable amount, the shipment can be rejected; is that it?

A. Yes, it is not a delivery of the contract.

Q. In other words, it wouldn't be profitable for the buyer to accept delivery of over five per cent?

A. I don't know what it would do to the buyer, but I know I cannot get an Association certificate and if I don't furnish the certificate, I haven't made a delivery, because my contract calls for a certificate.

Q. You furnish certificates?

A. The Dried Fruit Association examines the shipment and furnishes an inspection certificate.

Q. I notice in connection with Plaintiff's Exhibit No. 43—this is a contract between your firm and the American Almond Products Company, is it?

A. That's right.

Q. And signed by representatives of both firms; isn't that correct?

A. Let me see. Evidently, yes. [150]

Q. By Mr. Kaplan of American Almond and by somebody else of your firm?

Mr. Eisner: That document speaks for itself, if the Court please.

Q. (By Mr. O'Connor): Is that the regular and customary mode of doing business in the sale of apricot kernels, you enter into a written contract?

A. You enter into a written contract unless you

(Testimony of Ferdinand Ehrenfeld.)

have some other evidence of sales confirmation. You may have an exchange of cables or confirmation, but that is the—anything that embodies the terms of sale.

Q. Now, with this shipment to American Almond Products did you furnish one of those certificates? A. May I look at the contract?

Q. Yes.

A. I would like to point out to you the requirement of quality. May I be permitted to quote from the contract?

Q. To what paragraph are you referring?

A. Inspection.

Q. Yes.

A. "In view of the recognized hazard of water shipment due to climatic and other conditions, buyer hereby expressly assumes all risks provided seller furnishes a sworn certificate of weight and certificate of inspection (or the arbitration findings hereinafter provided for) of the Dried Fruit Association of California and said certificate shall be conclusive as [151] to weight, quality, grade and condition."

If the seller doesn't furnish it, it becomes automatically subject to arbitration on the other side.

Q. Oh, I see; arbitration where?

A. At the point of destination. I think that is a provision in the contract; I don't know just where, but I can get it.

Q. That is arbitration in California—there is an

(Testimony of Ferdinand Ehrenfeld.)

arbitration committee of the Dried Fruit Association of California?

A. There is one in case the shipper disagrees with the inspector's judgment. If he says, "Now this man has turned down this shipment and I think that shipment is right," then the man can ask for arbitration here, and these arbitrators either support or do not support and sustain the inspector.

Q. Yes. And I notice that in New York, arbitration in New York shall be held before the Association of Food Distributors, Inc.

A. Well, the contract speaks for itself.

Q. Yes. Is your firm a member of that Association in New York?

A. I believe we are a member, yes, although it is mostly for New York firms. It is mostly for the New York trade. I would like to add that my comments have been made on quality matters.

Q. On quality matters?

A. Yes, because that is what you asked me about. [152]

Q. Yes. The question of the percentage of weight over five per cent is not involved in a sample, is it? A. May I ask you to repeat?

Q. In a type sample the weight by broken kernels is not involved; it is just the quality that is involved?

A. That is the purpose of the type sample.

Q. Yes.

(Testimony of Ferdinand Ehrenfeld.)

A. You asked if that was the purpose of a type sample.

Q. Do you sell through a broker in New York? Or do you sell direct? Do you have offices there and do you sell direct?

A. We have no office. We generally sell through a broker, although we frequently have occasion to talk to the buyer direct, or the buyer comes out here.

Q. Is there anything to indicate on this contract whether it was sold through a broker or not?

A. I should think the contract would show it, would it not?

Q. It doesn't seem to; I just wondered whether you could tell.

A. The broker's name isn't shown. It is my recollection that the man who signed this contract, Mr. Arnold, negotiated directly with one of the gentlemen of the American Almond Company and talked to him about the price and the broker would get a brokerage on it, because the broker is entitled to get the brokerage.

Q. And did the broker sign on your behalf?

A. You are speaking of this deal? [153]

Q. Yes.

A. This deal, to my recollection, was made in California and it was signed here. Again I have to refer to the contract.

Q. By Mr. Arnold?

A. By Mr. Arnold and these people here.

Q. Mr. Arnold is the head of Rosenberg's?

(Testimony of Ferdinand Ehrenfeld.)

A. Mr. Arnold is the manager of the firm.

Q. But this was sold through a broker, that is your recollection?

A. It was sold—the negotiation was made here to my recollection, but the broker would get his brokerage, but the sale was made right here.

Mr. O'Connor: No questions.

Mr. Eisner: Let me ask, counsel, do you want to have the contracts produced to which this witness has testified as to the prices?

Mr. O'Connor: Let me ask one further question; that might dispose of it.

Q. Mr. Ehrenfeld, you do not customarily handle the negotiations for these various sales of apricot kernels, do you?

A. I do not customarily talk to the buyers, but I talk to the boys in the office who usually are courteous enough to ask me what I think about it before they make a fairly substantial sale.

Q. They do the regular work; you don't do the regular work? [154]

A. I don't do the, let us say, detail work, may I put it that way. I put in five or six hours a day.

The Court: Would it be a fair statement to say that you approve or disapprove?

A. Yes, I believe that is as clearly as I could state that.

Q. (By Mr. O'Connor): By the way, were you absent or away from Rosenberg Bros. at any time during the past five years? A. I was.

Q. For how long a period of time?

(Testimony of Ferdenand Ehrenfeld.)

A. I think I was away in Europe in 1954 for about four or five months, and I was away last year traveling for the firm six weeks last summer.

Q. Were you ever out of employment from Rosenberg's?

A. I was constantly in a consulting capacity and constantly on their payroll. Let me be correct; I think I go back about 38 years.

Q. I am speaking of just the past five years.

A. Yes, I was constantly on their payroll, and I was constantly there as a consultant, and particularly so in the last two or three years.

The Court: I knew that was important.

The Witness: More active than previously.

The Court: Now, do you wish these contracts produced?

Mr. O'Connor: No, I don't think it is necessary, your Honor. [155]

The Court: Now you are excused. You can go back and go to work.

The Witness: Thank you, your Honor.

The Court: Call the next witness.

JACK M. KAPLAN

recalled to the witness stand, having been previously sworn, testified further as follows:

Recross Examination—(Resumed)

(The reporter read the last question and answer of the witness' previous examination.)

Q. (By Mr. O'Connor): Mr. Kaplan, how many

(Testimony of Jack M. Kaplan.)

pounds of regular apricot kernels did you have on order on September 20, 1955 including those you had on order with Sewell Brown and Company?

A. Well, I have a summary sheet which is an extract from my records. This summary sheet does not give me the dates of delivery; that is to say, I may have some contracts here which may have been partially or completely fully executed as to delivery prior to that date, so I would want you to clarify it. Do you want all the tonnage partially delivered or undelivered; is that what you want?

Q. Delivered or undelivered.

A. Delivered or undelivered. And of course, I may have, as another clarificationary question, I may have—I assume you want the contracts which refer to kernels of that crop year, because conceivably I might have a small carry-over delivery [156] from the prior contract year.

Is that correct?

Q. That would be correct.

A. Well, I haven't got it summarized, but I can give you the individual figures as we go along and we can summarize it.

I have from Sewell Brown Company the figures I have previously indicated, which total 385,000 pounds, Sewell Brown contract.

I have two contracts from California Packing Corporation, one dated August 26th and one August 31st, total poundage 210,000 pounds.

We will take them all in pounds.

(Testimony of Jack M. Kaplan.)

And I have as the next contract on my contract register, the contract with Sunset-Sternau Company for 150,000 pounds.

I have California Prune and Apricot Association contract dated September 2nd, 210,000 pounds.

I have a contract from Mayfair Packing Corporation dated September 14th, total 100,000 pounds.

What was the termination date that you had indicated, Mr. O'Connor?

Q. September 20th.

A. Well, that is the last contract prior to September 20th.

Q. All right.

A. And that includes regular kernels and some steamed kernels, as you know from the case of Sewell Brown. Those are [157] the facts as I have them summarized here.

Q. What was the highest price you paid for any of the apricot kernels on order or delivery that you have just referred to?

A. 18 cents for regular apricot kernels.

Q. And that was between August 26 and September 14th?

A. That is correct.

Q. And then I believe the record shows that you entered into a contract with Rosenberg Bros. on September——

A. September 23rd, I believe.

Q. September 23rd for 28 cents a pound?

A. That is correct.

Q. You came to California when you heard of the fire at Sewell Brown and Company; is that

(Testimony of Jack M. Kaplan.)

correct?

A. That is correct.

Q. And the reason is because Sewell Brown and Company had some of your orders; they had 385,000 pounds, did they?

A. That is part of the reason. I wanted to determine what was happening with that contract, and I wanted to determine the possibility of making additional purchases because I had not covered for my requirements for the balance of the crop year.

Q. By the way, in the year 1954, what variance was there in the price of apricot kernels on the market?

A. I would say I couldn't tell you unless I checked the records. [158]

Q. What is your best recollection?

A. I must honestly say I have no real recollection of the price. These prices fluctuate rapidly, and from one year to the next there is such a variation that I would have to resort to the records before I could answer intelligently.

Q. Do you know what the variance in price was of regular apricot kernels during the year 1953?

A. I couldn't say unless I checked the records.

Q. Well, in 1954 was the variance 10 cents, 12 cents, or was it 5 cents or 2 cents?

A. I have answered that, Mr. O'Connor. I just don't know unless I look at the records. I wouldn't want to venture a wild guess and I would have to look at the records.

Q. As a matter of fact, during the year 1954,

(Testimony of Jack M. Kaplan.)

Mr. Kaplan, there wasn't a variance of more than 2 cents during the entire season for the price of regular apricot kernels, was there?

A. That may very well be; I couldn't say until I looked at the records.

Q. Do you know what the highest price was for apricot kernels during the year 1954?

A. I could get my records and answer right from them, if you are interested.

Q. Isn't it a fact that 19 $\frac{1}{4}$ cents a pound was the highest [159] price for regular apricot kernels?

A. I have no way of answering that question. I submit that I can get my records and read from my records, and I offer to do so.

Mr. Eisner: Are your records here, Mr. Kaplan?

The Witness: No, they are not, not for those years, but I can have them sent airmail or get the information given to me over the phone, or have them telegraphed.

The Court: What relation has the price of '53, '54 and '55 with relation to our problem?

Mr. O'Connor: It has this relationship, if the Court pleases——

The Court: Did they have two fires in that season?

Mr. O'Connor: No, no. It is a question at the time of the contract what hazards the person is contracting with reference to in the normal course of things, or what variance in prices they could be chargeable with.

The Court: Well, but the prices fluctuate from

(Testimony of Jack M. Kaplan.)

year to year, depending upon conditions existing at that time in relation to crop.

Mr. O'Connor: Yes.

The Court: In the period we are dealing with they had two fires. I don't know what bearing this testimony has upon the merits of this case.

Mr. O'Connor: It has this, your Honor: On the question [160] of what are the risks that the parties taken when they enter into a contract at a specified time for any specified price for certain merchandise.

If the merchandise has a record of non-fluctuation or small fluctuation, then it is one risk. If it is a risk commodity, then they contract with knowledge or notice of the risk involved and the price of that particular commodity and the variance or fluctuation of the price.

Mr. Eisner: That is a new principle of law that I never heard of before.

Mr. O'Connor: Well——

Mr. Eisner: Just a moment. We will make the objection in the interests of time——

Mr. O'Connor: I didn't speak to the Court idly, counsel; I will cite cases.

Mr. Eisner: We make the objection that this line of testimony is irrelevant, incompetent and immaterial, and not proper cross-examination.

The Court: I will allow the greatest latitude so the truth may appear lest I do violence to the law in that particular. That is the reason I call counsel's attention to the fact that the price varies from

(Testimony of Jack M. Kaplan.)

year to year, depending upon conditions, whether there are fires or what not. So we are dealing with this period here under the contract.

Mr. O'Connor: Yes, we are, but the cases will hold, if [161] the Court please, that the parties contract having in mind the usual variances or fluctuations of price levels of products that they are dealing with.

The Court: All right. Let us proceed.

Q. (By Mr. O'Connor): Mr. Kaplan, the Sewell Brown fire destroyed all of the poundage that you had ordered; is that correct?

A. That is not so.

Q. How much was destroyed?

A. I can answer authoritatively that I had three contracts; in each case some portion of the poundage involved was affected by the fire as to loss in the fire. I had one contract dated prior to the fire with California Packing Corporation where no poundage was involved in the fire, and I had full delivery, and these other three cases, eliminating Sternau for the moment—in these other three cases, Sewell Brown was directly involved in the fire; California Prune and Apricot Association had their kernels at the Sewell Brown plant and they were involved in the fire to some extent. Some of them were not delivered.

Mayfair Packing had some of their kernels delivered to the Sewell Brown plant, and some of those were involved in the fire, and I received partial deliveries on each of these contracts, because

(Testimony of Jack M. Kaplan.)

it is a well known principle and it is stipulated in many of these contracts there is a force majeure [162] clause, which indicates—and I am not quoting it, but as I understand it—that in the event of fire that the seller has a right to apportion his total holdings at the date of the fire—apportion his total holdings prior to the fire and the undamaged portion subsequent to the fire and pro rata make distribution to each buyer accordingly.

And on that basis I received pro rata deliveries from each of these three I mentioned, Sewell Brown, Prune and Apricot, and Mayfair Packing.

Q. All right. The Sewell Brown fire and the consequent destruction of a considerable amount of tonnage of regular apricot kernels resulted in a shortage of supply, causing the market price of kernels to go up, did it not?

A. It did.

Q. Did you make a test of the two 100-pound sample bags of kernels that were shipped to you on or about August 31st by Sunset-Sternau?

A. I made a sample test of one bag and retained one as a retaining sample, expecting delivery, for quality.

Q. Did you make a test with reference to the weight of broken kernels in the bag?

A. We did not. We made no test other than a superficial examination, and we could very readily see, after many, many years' experience with this product, an excessive amount of broken kernels. And I would say, as I have previously said—I [163]

(Testimony of Jack M. Kaplan.)

examined this material personally upon arrival; I would say that my best estimate of the percentage of broken kernels contained in those two bags ran about seven or eight per cent broken.

Now, that was an estimate based upon a superficial examination without weighing.

Q. Is that a normally excessive amount of broken kernels?

A. There is no such a thing as a normal excess. Normal is within five per cent; anything above five per cent is not normal. I have never seen prior to this occasion, in a regular apricot kernel delivery.

Q. Prior to this occasion you had never seen apricot kernels in the excess of five per cent broken?

A. Not in the regular apricot kernels—so labeled bag of apricot kernels.

Q. Well, did you tell Mr. Frank Sullivan of Prince-Keller and Company on or about September 8th, that you found the apricot kernels involved were satisfactory with one exception, the broken kernels far exceeded the normal tolerance?

A. I told Mr. Sullivan that there was a normal tolerance understood in the trade of five per cent broken maximum. I told him that the type sample I received had in excess of five per cent broken; that there was a normal requirement, express or implied, but it was normal either way—a regular custom in the trade, where regular kernels were not to contain more than five per cent broken, and I indicated that in some cases [164] we have con-

(Testimony of Jack M. Kaplan.)

tracts where they do not show the five per cent expressly stipulated, and some do. I have one here from M. J. Bond Company, where there is no five per cent clause. I have another from Prune and Apricot where there is no five per cent quoted. I have one from Mayfair where the broker's confirmation shows five per cent, and the confirmation more formally executed contract does not show the five.

Some do, some do not. It is flexible, but they are all expressly understood not to have more than five per cent, whether it is said, or whether it is not.

The Court: We will take an adjournment until 10:00 o'clock tomorrow morning.

(Thereupon an adjournment was had until Tuesday, February 26, 1957, at 10:00 o'clock a.m.) [165]

Tuesday, February 26, 1957—10:00 O'clock A.M.

JACK M. KAPLAN

resumed the stand, having been previously duly sworn, and testified further as follows:

Further Cross Examination

The Clerk: Jack M. Kaplan to the stand, heretofore sworn.

Q. (By Mr. O'Connor): Now, Mr. Kaplan, in your testimony yesterday I believe you stated that at the time of the Sewell Brown fire in Los Gatos that you had certain orders for kernels and that a

(Testimony of Jack M. Kaplan.)

part of those orders or the supplies were at Sewell Brown's plant in Los Gatos; that is correct, is it?

A. That is correct.

Q. And as I recall your testimony, you had 385,000 pounds bought on order from Sewell Brown, which included regular and steamed kernels; that is correct, is it not?

A. That is correct.

Q. And did you also—my notes do show that California Packing had some of their kernels down there; is that correct?

A. Your notes are not correct. I assume that you are implying there that California Packing had kernels involved in the location of the fire. Is that what you are implying?

Q. Yes.

A. That is not correct.

Q. Did any other firm, such as Mayfair, that you had an [166] order for a 100,000 pounds of kernels—did they have any of their kernels there?

Mr. Eisner: It is understood, if the Court please, that this line of examination pertaining to other contracts is objected to as irrelevant and immaterial and not proper cross examination. I made the objection before.

Mr. O'Connor: The purpose of this is just to—and this is the last series of questions I have on this subject, your Honor—is to establish the number of pounds of kernels that he had on order that were located at the scene of the fire of Sewell Brown in Los Gatos.

(Testimony of Jack M. Kaplan.)

The Court: What relation has that to the issues involved here?

Mr. O'Connor: I then want to determine how much—the witness testified yesterday, without testifying to the amount, that he received from these orders certain amounts by reason of prorations.

I want to determine how much he received back by way of prorations.

Mr. Eisner: I can see no relevancy or pertinency, if the Court please.

The Court: You certainly will be sustained.

Q. (By Mr. O'Connor): Mr. Kaplan, how many pounds of kernels did you buy after September 21st? A. After September 21st? [167]

Q. Yes.

A. Well, again, rather than give you the grand total, I will give you the individual contracts that I have. We can add that up.

I have one contract, September 23, 1955, with Rosenberg's which has been submitted as another exhibit. This contract—I shall give you these figures in pounds so that they are all consistent.

Q. Yes.

A. This contract had 350,000 pounds of regular kernels and in addition 350,000 pounds of steamed kernels.

I had a subsequent contract dated November 7th, same year, with California Packing, which was for 60,000 pounds of regular kernels.

I had—well, this is January 16, 1956. I don't

(Testimony of Jack M. Kaplan.)

know if you want to go into 1956, but that is my next contract.

Q. I want to confine it to 1955.

A. That is the last contract.

Q. Those are the last contracts. Now, Mr. Kaplan, I will show you the bought note which forms Plaintiff's Exhibit No. 8.

A. I have a copy of it.

Q. I think you have a copy of it there in your file, do you not?

A. Right. I just wanted to get it, Mr. O'Connor, so that [168] I have it handy right here. Yes.

Q. You were familiar with the terms of that particular bought note; it is the usual type of bought note used in New York City, is it not?

A. It is.

Q. And I call your attention, Mr. Kaplan, to the fact that in the last line of the fine print at the bottom of that contract appears the word "arbitration." A. Correct.

Q. Under the head note "Arbitration" appears the following language:

"Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Inc., of New York City—this memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties.—Seller agrees to conform to National Pure Food Laws."

(Testimony of Jack M. Kaplan.)

A. That's right.

Q. Mr. Kaplan, did you at any time, prior to commencing this action, commence or initiate arbitration proceedings before the Association of Food Distributors, Inc., of New York City?

Mr. Eisner: That is objected to as incompetent, [169] irrelevant and immaterial, not proper cross examination. We are here before a court trying the issues in this case. The defendant has filed an answer meeting the issues in this case, trying it, and we cannot raise a question whether or not there was an arbitration. The defendant in the action or any party to the action cannot try the case before a court of law, speculate upon the decisions of the issues, and then raise the question about arbitration, if the Court please.

Furthermore, counsel has denied and is denying the existence of the contract, and when the existence of the contract itself is put into issue, the arbitrators cannot try such an issue involving the very existence of the contract.

If a controversy arises under a contract, the arbitrators can try the issue. But that is entirely beside the point here. There is no defense; there is no issue; there was no offer of the defendant to arbitrate. The issue of the case is tried before a court of law, and it is altogether out of order to raise any question of arbitration.

Mr. O'Connor: May it please the Court, in the present case the complaint recites the existence of

(Testimony of Jack M. Kaplan.)

a written contract dated September 8th. Until Mr. Kaplan, representing the plaintiff in this action, took the stand and testified under cross examination that this was the contract that he referred to in his pleadings, that this was the contract he was relying upon, it was not determined exactly what was the written contract. [170]

Now he has testified that this is the written contract, and having so testified, then if that contract contains a condition precedent to suit, that condition must be met.

This contract contains a definite provision for arbitration, and I respectfully submit to the Court that if this is the contract the plaintiff relies upon, then the plaintiff must show a performance under the terms of the contract.

The Court: How could there be an arbitration there in the light of the testimony in this record?

Mr. O'Connor: If the Court pleases, under the terms of this contract, there could be a commencement of arbitration. There could be a refusal by the defendant to recognize the contract so far as the arbitration was concerned; the arbitrators could hear the evidence, fix either liability or non-liability, and then suit follow, and that is the ordinary and proper course to pursue.

The Court: What could have been done is beside the issue here. Keep in mind this record. How could there be an arbitration of the conduct of the parties on both sides?

Mr. O'Connor: Well, if this plaintiff insists that

(Testimony of Jack M. Kaplan.)

this is the contract, then he is bound by the terms of the contract he asserts.

The Court: In the interests of time I will allow it to go in subject to a motion to strike over your objection. [171]

Mr. O'Connor: May I proceed?

The Court: Reframe your question.

Q. (By Mr. O'Connor): Mr. Kaplan, did you or any member of the firm of American Almond Company, the plaintiff in this action, prior to the filing of this action, commence or initiate any arbitration proceedings before the Association of Food Distributors, Inc., of New York City?

A. No, sir. I have a reason, your Honor——

Q. No.

The Witness: I would like to submit the reason for not doing so.

The Court: You may explain your answer if you wish.

The Witness: We have an attorney representing us in New York City with whom I discussed this matter. This attorney advised me—and by the way, the attorney was the general counsel of the New York Food Distributors Association which runs these arbitrations now being discussed, whom I consulted on this matter.

Mr. O'Connor: If the Court please——

The Witness: Alexander Blank.

Mr. O'Connor: I will submit that the answer of this witness is completely hearsay and not binding upon this defendant.

(Testimony of Jack M. Kaplan.)

Q. (By the Court): On the advice of counsel you did what?

A. He advised me——

The Court: Not what he advised you. [172]

The Witness: I am sorry.

The Court: As a result of his advice——

The Witness: As a result of this advice, I refrained from making any initial act to bring this to arbitration in New York City.

Mr. O'Connor: I will move that the answer be stricken as completely hearsay.

The Court: What is hearsay?

Mr. O'Connor: The statement that he did so on the advice of an attorney and testifying as to the conversations he had with the attorney.

The Court: I will allow the record to stand.

Q. (By Mr. O'Connor): Now, Mr. Kaplan, you were aware, were you not that prior to the dealings in these kernels, and during the time that the dealings were progressing in the kernels, that Prince-Keeler used a different type of contract than the one that is identified as Plaintiff's Exhibit 8 in connection with confirming or indicating sales insofar as Sunset-Sternau Food Company was concerned, were you not?

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial, not proper cross examination. Counsel is apparently referring—he has handed me a transaction in an entirely different commodity, almonds, and whatever procedure was

(Testimony of Jack M. Kaplan.)

followed in that is entirely irrelevant, incompetent and immaterial. [173]

The Court: Submitted?

Mr. O'Connor: Yes, your Honor.

The Court: The objection will be sustained.

Mr. O'Connor: Well, then I offer to prove, by the introduction of these documents, if the Court please, in connection with certain other documents which are on file, that Prince-Keeler and Company, Inc., the brokers who represented both parties to this particular transaction, were specifically instructed by the defendant in this case prior—a long time prior to the negotiations in this case that they were not to use the ordinary bought and sold note being used in New York City and which is in evidence as Plaintiff's Exhibit No. 8; that the defendants would not and did not agree to such type of bought and sold note, and wanted a mere memorandum of sale; and that special memorandums of sale were printed for the purpose of recording any buying and selling on behalf of the defendants; and that at all times Prince-Keeler and Company knew—and this defendant knew—that all orders were subject to written confirmation from Sunset-Sternau on their own contract—their own contract form.

And I have here a form of seller's note, one which represents a transaction with the American Almond Products Company, under date of October 14, 1954, the contract itself being in evidence in this case, your Honor, and another memorandum

(Testimony of Jack M. Kaplan.)

or note of the same type, bearing date October 13, 1955, showing the particular type of memorandum of sale. [174]

The Court: Of what?

Mr. O'Connor: Well, in this case, for any of the products—they were to be used in any products of Sunset-Sternau Company by Prince-Keeler and Company of New York, the brokers in this case; and the notes in questions were the ones ordinarily used by Prince-Keeler and the only ones they were authorized to use, in any event; they were not authorized to use the note which was used in this particular case, namely, Plaintiff's Exhibit No. 8, part of which I have just quoted, insofar as the arbitration clause is concerned.

I offer to prove these facts and to introduce these memorandums or sellers' notes into evidence at this time in support of the defendant's case.

Mr. Eisner: That would be entirely irrelevant and immaterial, if the Court please. Any instructions or any transactions between the defendant and his broker unknown to the plaintiff in this action would be entirely irrelevant and immaterial.

Let us assume the defendant wanted the broker to use another form, and the broker used the customary form. The customary form was used in this instance. The sale was recognized. The record is just filled with documents in which the transaction was recognized, and the fact that in other transactions, if there were such—in almonds they may have used or wanted to use another form of bro-

(Testimony of Jack M. Kaplan.)

ker's memorandum— is [175] entirely irrelevant and immaterial to this case and not proper cross examination.

The Court: The objection will be sustained.

Mr. O'Connor: Very well. No further questions, your Honor.

The Court: Step down.

Mr. Eisner: I have just one question.

Redirect Examination

Q. (By Mr. Eisner): Mr. Kaplan, counsel asked you pertaining to transactions in apricot kernels in which the broker's memorandum was issued and was not followed by any formal contract. I am going to show you a document which was already indicated on your cross examination and ask you if that is such a broker's memorandum?

A. It is.

Mr. O'Connor: May I see that document, counsel, please?

(Document shown to counsel.)

Q. (By Mr. Eisner): This broker's bought note represents a purchase made by American Almond Products Company from Sewell Brown and Company? A. That is correct.

Q. Represents a purchase of 280,000 pounds of fancy regular California apricot kernels, and 105,000 pounds of regular Santa Clara steamed apricot kernels? A. That is correct. [176]

Q. And Mr. Kaplan, I call your attention to the fact that the exact language appears upon this

(Testimony of Jack M. Kaplan.)

bought note that appears upon the one that has been identified as the bought note in this case, in particular:

“This note shall be subordinate to more formal contract when and if such contract is executed. In the absence of such contract, this note represents the contract of the parties.”

I will ask you: Was this memorandum followed by any other contract of any character?

A. No, sir, it was not. And it is the policy of Sewell Brown never to follow with a more formal contract, but merely to rely upon this memorandum as the contract between the parties.

Q. I notice——

Mr. O'Connor: Just a minute. I will move to strike that answer as not responsive to the question, and on the further ground that it is incompetent, immaterial and irrelevant, so far as the issues of this case are concerned. We have a specific deal upon which they are suing here; we have the deal between Sunset and the plaintiff.

The Court: The objection will be overruled. Let the question and answer stand.

Q. (By Mr. Eisner): Mr. Kaplan, I also notice in this contract that this is one in which there is no mention made [177] of the tolerance of five per cent broken; is that true?

A. That is true.

Mr. Eisner: We offer this broker's memorandum in evidence as plaintiff's next exhibit.

The Court: Let it be admitted next in evidence.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: My objection goes to the introduction of that document.

The Court: Let the record so show. The objection will be overruled.

The Clerk: Plaintiff's Exhibit 44 admitted and filed in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 44 in evidence.)

Q. (By Mr. Eisner): I show you a contract also made in 1955, Mr. Kaplan, and ask you what this is.

Mr. O'Connor: May I see those documents, counsel? If you have them here I can look them over. Oh, you have them altogether here.

(Documents shown to counsel.)

Q. (By Mr. Eisner): What does that represent?

A. This represents a broker's memorandum, which is a bought note, for my purchase of a 100,000 pounds of apricot kernels from Mayfair Packing Company, dated September 14, 1955. Attached to it is the more formal contract referring to the same transaction between Mayfair Packing and my firm. [178]

Q. And this contract is also one for regular apricot kernels? A. It is.

Q. And I call your attention to the fact that there is nothing mentioned in this contract from Mayfair Packing Company pertaining to the five per cent tolerance. A. That is correct.

Q. And that was implied?

(Testimony of Jack M. Kaplan.)

A. That is correct.

Mr. O'Connor: I move to strike the answer, if the Court pleases, as the conclusion of the witness.

The Court: Identify it.

The Witness: It is under the terms of the contract, I might answer your Honor, that that calls for—on the reverse side of the formal contract it calls for a Dried Fruit certificate, and a Dried Fruit certificate of quality prior to shipment would obviously indicate not in excess of five per cent broken—not to exceed five per cent.

The Court: That document will speak for itself.

Mr. Eisner: We offer this document in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 45.

(The document referred to was marked Plaintiff's Exhibit No. 45 in evidence.)

Q. (By Mr. Eisner): Now, Mr. Kaplan, I show you this document and ask you what that is. [179]

A. That is a broker's memorandum confirming a sale to our firm from California Prune and Apricot Association of 210,000 pounds of apricot kernels, dated September 2, 1955.

Q. I show you this document and ask you what that is.

A. This is the more formal contract between the parties referring to the same transaction.

Mr. Eisner: We offer these two documents in evidence as Plaintiff's Exhibit next in order.

The Court: Let them be admitted and marked, next in order.

(Testimony of Jack M. Kaplan.)

Mr. O'Connor: Same objection to the introduction.

The Court: The objection will be overruled.

(The documents above referred to were marked Plaintiff's Exhibit No. 46 in evidence.)

Mr. Eisner: I call the Court's attention to the fact that the broker's memorandum says "Not to exceed five per cent by weight broken," and nothing is said in the formal contract. It is either express or it is implied.

Q. Mr. Kaplan, counsel asked you the particulars in which the letter of September 8, 1955, written by Prince-Keeler and Company to Sunset-Sternau Food Company, was not accurate. I will ask you to tell in what respects the letter was not accurate.

A. Well, I quote from the letter—I have a photostat here. I think it is the third paragraph, after quoting the five per cent clause, where the next sentence—— [180]

The Court: Read the whole letter.

The Witness: The entire letter, your Honor?

The Court: Yes.

The Witness: This is a letter from Frank Sullivan of Prince-Keeler addressed to Sunset-Sternau Food Company:

"Gentlemen:

"Mr. Kaplan of American Almond Products Company, Incorporated, phoned today that the two 100-pound bags of apricot kernels were received and found satisfactory with one exception, that the

(Testimony of Jack M. Kaplan.)

broken kernels far exceeded the normal tolerance.

“We advised him that we were mailing your formal contract numbered 2013, received today. However, during the discussion he advised that he had overlooked the following standard clause: ‘Merchandise not to exceed five per cent by weight of broken kernels,’ and requested that we add this on our contracts and return yours for the same addition.

“He advised that all his regular suppliers, that is, Calpak and Rosenberg, insert that clause, which is a recognized condition of sale of this particular item.

“It was not brought up before because he assumed it would be included as a matter of course in your contract. [181] We are therefore returning your contract No. 2023 as an enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer’s request.

“Awaiting your further advice in this matter,

“Yours very truly, Prince-Keeler, signed Frank L. Sullivan.”

Now, there is the following objection on my part, particularly the sentence beginning “He advises”—referring to Mr. Kaplan—“He advises that all his regular suppliers, that is, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item.”

As I have previously testified, I think more than once, I said to Frank Sullivan that this is a recog-

(Testimony of Jack M. Kaplan.)

nized condition of sale of this particular item, but it may or may not be specifically expressed in a contract; that it was a flexible procedure, but that some do include it and some do not. Where it was not specified, it was implied in the custom of the trade.

And I further said that in view of the fact this was my first transaction with Sunset-Sternau, I would prefer that he be put on notice and specifically insert all the implied warranties. That is my major objection to this letter.

There may be one or two negligible things, such as—I will mention them—"The broken kernels far exceeded the normal tolerance." [182]

I never said that they far exceeded the normal tolerance. To me this point was insignificant. They simply exceeded the tolerance and I requested that they be specifically within the five per cent. That was my objection to this letter.

Mr. Eisner: That is all, Mr. Kaplan.

Recross Examination

Q. (By Mr. O'Connor): Mr. Kaplan, did you ever make any objection in writing to the contents of that letter of September 8th from Prince-Keeler, which is, I believe, Plaintiff's Exhibit No. 10?

A. No, I did not.

Q. Did you ever at any time advise Prince-Keeler that the contents and statements contained in that letter were incorrect?

A. No, I did not.

(Testimony of Jack M. Kaplan.)

Q. Did you at any time advise Sunset-Sternau, the defendant in this case, that the contents of that letter were incorrect?

A. Wait a moment. Because I had many conversations with Mr. Sternau and I want to reflect on that.

There was a discussion, as I have previously testified, a telephone conversation in September, where you put the question to me, did I waive the five per cent broken clause. We had some discussions on that, and I am trying to recall as to whether we had any discussions with reference this matter other than what I have already indicated. [183]

Well, I can say that in this conversation with Mr. Sternau, as I have previously testified, I had no problem in my mind but that I would be able to get either California Packing Corporation or Rosenberg to do this, and I indicated that if they did the crack out, there would obviously be no difficulty, and I wasn't concerned about any problem in excess of five per cent unless I could not get either one of these firms to do it, and in that case, if we had to rely on some other third unknown party—and I never requested Mr. Sternau to inform me as to who this third unknown party was; I couldn't imagine, but I don't know every nook and cranny in California; conceivably there might have been someone—in this case, I said to Mr. Sternau, "If such should be the case and you would need a waiving of the excess of five per cent, in that case I would agree to it."

(Testimony of Jack M. Kaplan.)

That is as far as I discussed it.

Q. (By Mr. O'Connor): You never waived that in writing in any of your communications with Sunset?

Mr. Eisner: That has already been gone into, if the Court please.

The Court: He answered that he did not.

The Witness: I did not.

Mr. O'Connor: No further questions.

The Court: Step down.

Mr. Eisner: The plaintiff rests, if the Court please.

Mr. O'Connor: Mr. Sternau, will you take the stand, please. [184]

SIDNEY STERNAU

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Court: Your full name please?

A. Sidney Sternau.

The Court: Where do you live?

A. 502 College Avenue, Modesto, California.

The Court: What is your business or occupation?

A. President of Sunset-Sternau Food Company.

The Court: Take the witness.

Direct Examination

Q. (By Mr. O'Connor): Mr. Sternau, you are the President of the defendant corporation in this case, are you? A. Yes, sir.

(Testimony of Sidney Sternau.)

Q. And did you in the month of July have occasion to visit the plaintiff, and specifically Mr. Kaplan at their plant in Brooklyn, New York?

A. Yes.

Q. And you were in company with Mr. Astrack of Prince, Keeler at that time? A. Yes.

Q. And you had with you, did you not, a sample of regular kernels—apricot kernels?

A. I did. [185]

Q. And did you show those to Mr. Kaplan?

A. I did.

Q. For the purpose of trying to make a sale, or what was your purpose?

A. For the purpose of trying to make a sale.

Q. Was there any discussion about apricot kernels with Mr. Kaplan at that time and the position of you and your company with reference to that product?

A. The only discussion was on price; that we would be competitive.

Q. Was there any discussion there at the time as to whether or not this was the first time that you were in that business?

Mr. Eisner: Just a moment. We object to that as leading and suggestive, if the Court please. Counsel has asked for a conversation; the witness has answered. That is the only way——

The Court: Fix the time, place and persons present and develop the conversation whatever it is.

Mr. O'Connor: I think we have established Mr.

(Testimony of Sidney Sternau.)

Astrack was present; Mr. Kaplan was present; is that correct? A. Yes.

Q. (By the Court): And when was this?

A. That was in July.

Q. (By Mr. O'Connor): What date.

A. Around the 15th or 17th of July; I am not positive. [186]

Q. (By the Court): And where was this?

A. In New York City—in Brooklyn.

Q. (By the Court): Who was present?

A. Mr. Kaplan, Mr. Astrack and myself.

Q. (By the Court): In the morning or afternoon?

A. I believe it was in the morning.

The Court: Take the witness.

Q. (By Mr. O'Connor): What conversation was there relative to the apricot kernels at that time? What was said by you and what was said by Kaplan?

A. I told him that we were absolutely new in the business, we didn't know much about it, and Mr. Kaplan agreed he wanted to help us——

Mr. Eisner: A little louder; I can't hear.

Mr. O'Connor: Speak louder, Mr. Sternau.

A. I said we told Mr. Kaplan we were new in the business; it was the first offer we ever made, and he wanted to assist a new packer.

Mr. Eisner: What was that last?

A. He wanted to assist a new packer.

The Court: He wanted to assist a new packer.

(Testimony of Sidney Sternau.)

Mr. O'Connor: Mr. Sternau has a slight impediment of speech which makes it a little difficult.

The Court: Raise your voice.

The Witness: Yes. [187]

The Court: The reporter has to take this down.

Q. (By Mr. O'Connor): Mr. Sternau, did you, after leaving the offices of the plaintiff that day, did you subsequently receive any communications so far as sale to them of regular apricot kernels?

A. No.

Mr. Eisner: Received any communication from whom, Counsel?

Mr. O'Connor: From either American Almond Company or from Prince, Keeler and Company in New York.

A. I don't remember receiving any communication.

Q. You subsequently did receive, though, a communication from Prince, Keeler advising that American Almond wished to buy seventy five tons of regular apricot kernels? A. Yes.

Q. That is correct, is it not? A. Yes.

Mr. Eisner: Just a moment please. Well——

Q. (By Mr. O'Connor): Did you thereafter send or cause to be sent to American Almond Company two one hundred pound bags of regular apricot kernels as samples? A. Yes.

Q. And did you hear from either American Almond Company or from Prince, Keeler the results of their testing of the samples?

A. Yes, we did. [188]

(Testimony of Sidney Sternau.)

Q. I will show you a letter, which is plaintiff's Exhibit No. 10 in evidence, and ask you if that is the communication you received relative to their test of the two sample bags. A. Yes.

Q. And that letter recites the fact, does it not—I'm trying to summarize this so as not to read the entire letter, your Honor—it recites the fact that the quality of the sample was approved but that the sample far exceeded the normal tolerance of five per cent by weight of broken kernels, does it not? A. Yes.

Q. You received that communication on the eighth? A. Yes.

Q. Or it is dated the eighth. You received it in the regular course of mail, I assume. A. Yes.

Q. Mr. Sternau, had you previously received from Prince, Keeler under date of September 1, 1955, at your plant in Modesto what has been referred to here as a bought note and which is plaintiff's Exhibit No. 8. A. Yes.

Q. And upon receipt of that bought note, what did you, or when I speak of you, your firm, do?

A. Mailed a formal contract to Prince, Keeler for signature.

Q. Mr. Sternau, at any time prior to September 1st or [189] September 8th, 1950, had you or your firm authorized Prince, Keeler in writing to bind your firm to any contract? A. Never.

Mr. Eisner: Just a moment. That is objected to as calling for the conclusion of the witness. The documents will speak for themselves.

(Testimony of Sidney Sternau.)

The Court: Objection sustained.

Mr. O'Connor: If the Court please, I have no way of proving the existence or non-existence of a document. There is no such document in existence.

The Court: It would clearly call for the opinion and conclusion of this witness. The Court has ruled.

Mr. O'Connor: I will make an offer of proof at this time, to prove through this witness, if the Court please, that there never had been executed by the defendant company any authority in writing to Prince, Keeler and Company, brokers, in New York City, to bind the defendant company to any contract.

Mr. Eisner: That is objected to——

Mr. O'Conner: That is the only purpose of the question.

Mr. Eisner: That is objected to as calling for the conclusion of this witness. The documents will speak for themselves.

The Court: The Court has ruled. The objection will be sustained. [190]

Q. (By Mr. O'Connor): What did your firm do, upon the receipt of this document entitled plaintiff's Exhibit No. 8?

A. We mailed a formal contract.

Q. And I will show you a document which has been introduced in evidence as plaintiff's Exhibit No. 9 and ask if that represents—bearing in mind this is a photostat—does that represent the contract which was sent by your firm to Prince, Keeler?

A. Yes, sir.

(Testimony of Sidney Sternau.)

Q. And the date of this document is September 6th? A. Yes.

Q. That is correct, is it not? A. Correct.

The Court: That is exhibit what, for the record?

Mr. O'Connor: Exhibit Number 9, your Honor.

Q. In the letter of September 8th, 1955 from Prince, Keeler and Company, which is plaintiff's Exhibit No. 10, they returned your formal contract to you, did they not? A. Yes.

Q. And they requested that you add a clause to that contract as follows:

"The merchandise not to exceed five per cent by weight of broken kernels"; is that correct?

A. Yes, sir.

Q. Did you, the defendant, your firm, include that in a [191] contract and return it to Prince, Keeler and Company? A. No, sir.

Q. Why not?

A. Because we were not able to comply with that; Mr. Bonzi informed us.

Q. Did you after receipt of this letter of September 8th attempt to determine whether you could comply with the five per cent clause referred to?

A. Yes, sir.

Q. And what did you do to determine whether or not you could comply with that clause?

Mr. Fisner: That is objected to as irrelevant, incompetent and immaterial, if the Court please, what efforts the witness may have made to see whether or not he could comply with that clause.

(Testimony of Sidney Sternau.)

If the clause exists it was his duty. If he sold to comply with it.

Mr. O'Connor: Now wait a minute. We have a sale by sample here, if the Court please. We have a sample and the report on the sample from the broker says that it far exceeded—and I quote the language of the letter which is in evidence:

“Far exceeded the normal tolerance.”

The Court: I will allow it subject to a motion to strike.

Mr. O'Connor: Would you read the question back, Mr. Reporter? [192]

(The reporter read the question.)

A. We contacted Mr. Bonzi after several weeks of trying to find him, and he informed us we could not comply with this clause.

Q. Who was Mr. Bonzi?

A. Mr. Bonzi was the man, the party, we were selling the apricot kernels for.

Q. That Sunset Sternau was selling them for?

A. Yes.

Q. And he advised you that he could not supply a product any better than the sample?

A. Yes, sir.

Q. Did you so inform Prince, Keeler and Company? A. Yes, sir.

Q. I show you a letter dated September 21, 1955, which is plaintiff's Exhibit No. 11, and ask you if you wrote that letter. A. Yes.

Q. Will you read the letter, please?

(Testimony of Sidney Sternau.)

Mr. Eisner: The letter speaks for itself, if the Court please.

The Court: I will allow him to read it.

A. "Dear Bill: We just had the packer in the office who is going to shell the apricot kernels and he advised me [193] that he could not guarantee five per cent pieces; that they cannot do any better than the sample. He is having a very difficult time in shelling these and would like to get out of the contract this season"——

Mr. Eisner: "This contract"——

The Witness: ——"this contract this season.

"Please advise if you are able to do it. It will be a personal favor if it is possible to assist this man setting up his plant the right way. Please advise us by Monday about this."

Q. (By the Court): What is the date of that?

A. The date of that is September 21st.

Mr. O'Connor: September 21st, your Honor.

The Witness: September 21st.

Q. (By Mr. O'Connor): At the time you wrote this letter, Mr. Sternau, did you know whether or not there had been a fire at the plant of Sewell Brown and Company in Los Gatos?

A. No I did not.

The Court: What was the date of the fire again?

Mr. O'Connor: September 20th, the day before.

The Court: And this?

Mr. O'Connor: September 21st.

Q. Mr. Sternau, did you subsequently and on or about between the 22nd and 24th of September re-

(Testimony of Sidney Sternau.)

ceive any telephone calls from Mr. Kaplan? [194]

A. Yes, I believe I did.

Q. Did you have any recollection or independent recollection of that conversation?

A. No, I don't remember; it is too long ago and we were too busy.

Q. Can you tell me, Mr. Sternau, did you make notes by the way of that conversation?

A. No, I did not.

Mr. Eisner: Counsel I didn't quite get the question.

Mr. O'Connor: He said no.

Mr. Eisner: This pertains to the conversation in September?

Mr. O'Connor: In September, yes.

Q. You don't have any independent recollection of that conversation?

A. Not any recollection; it is too long ago. They recalled and brought to my attention I had this conversation. I might have, but I don't remember. During that month business is very fast in our affairs and they go by.

Q. Now, Mr. Sternau, after you wrote this letter of September 21st did you at any time receive from Mr. Kaplan, or from the plaintiff in this case, either verbally or in writing, any written waiver of the five per cent by weight clause which they had insisted be in a written contract?

A. No, no, I don't remember receiving any verbal or written—— [195]

Q. In the conversations in November when Mr.

(Testimony of Sidney Sternau.)

Eisner was present with Mr. Kaplan and Mr. Bonzi in Modesto, did either Mr. Kaplan or Mr. Bonzi or Mr. Eisner at that time ever discuss with you the waiver of that condition? A. No.

Q. Was there any discussion during the conversations in November at Modesto relative to Sunset Sternau's liability to American Almond Company?

A. No, I don't think there was.

Mr. Eisner: May I suggest, Counsel, the proper way to ask that question if you want—

Mr. O'Connor: Do you want me to lay the foundation for it—persons present and so forth?

Mr. Eisner: I don't care about that. We know who was there. When you are asking about a conversation I would suggest that you ask for it and let the witness if he remembers state what took place.

Mr. O'Connor: In substance I have asked for that.

Q. What was said at those conversations, Mr. Sternau, relative any contract between Sunset Sternau and the plaintiff, American Almond Company in this case, if anything?

A. I think Mr. Eisner said that they had a contract with us, but they questioned Mr. Bonzi mostly. That was the morning in Mr. Price's office. Most of the conversation was between Mr. Eisner and Mr. Bonzi and with Mr. Price. We were [196] on the—we were just there, and in that conversation we told them we would do anything possible to cooperate with them; that we offered them

(Testimony of Sidney Sternau.)

our apricot kernels without any charge or anything the way the thing was set up.

Q. Mr. Sternau, after September 8, 1955, why didn't you send back to Prince, Keeler or to American Almond Company a contract containing the five per cent clause?

A. Because we were unable to comply with it; Mr. Bonzi couldn't shell them satisfactorily.

Q. In other words you couldn't meet that condition? A. We couldn't meet that.

Mr. Eisner: Just a moment, Counsel. I object to the question as leading.

Mr. O'Connor: Do you have an objection?

Mr. Eisner: I made the objection. You were summarizing.

Mr. O'Connor: No further questions.

The Court: We will take a recess.

(Short recess.)

Cross Examination

Q. (By Mr. Eisner): Now, Mr. Sternau, you testified to the business that you were engaged in, that of the Sunset Sternau Food Company. Has the Sunset Sternau Food Company ever engaged in the business of making paste from almond kernels—from apricot kernels?

A. I believe about ten years ago. [197]

Q. In other words, about ten years ago the Sunset Sternau Food Company engaged in the same line of business as the American Almond Products

(Testimony of Sidney Sternau.)

Company; that is of making paste from almond kernels; is that true?

A. Making paste from apricot kernels.

Q. From apricot kernels; excuse me. Is that true? A. Yes, sir.

Q. For how many years has the Sunset Sternau Food Company engaged in that business.

A. Oh, approximately about ten years.

Q. Ten years. During the time Mr. Sternau, had the Sunset Sternau Food Company made many purchases of apricot kernels?

A. Yes, I believe so.

Q. Have they made purchases of apricot kernels from the California Packing Corporation?

A. I couldn't tell you who; I didn't do the buying at that time. I am unable to answer your question.

Q. They purchased apricot kernels from firms that sold them; is that correct?

A. That is correct.

Q. And made these apricot kernels into paste?

A. That's correct.

Q. During that period of time over the ten years had the Sunset Sternau Food Company made many purchases of what were known as regular apricot kernels? [198]

A. I couldn't tell you if they were regular, irregular, steamed, or any way; I didn't do the buying.

Q. Whether you did the buying or not, how long have you been president of the company?

(Testimony of Sidney Sternau.)

A. I have only been president ten years.

Mr. O'Connor: Just a moment. If the Court please, I will submit that Counsel is now attempting to badger and abuse the witness. His question as to the familiarity with the business is material.

The Court: He is president of the business.

Mr. O'Connor: He is now.

The Court: He was at that time.

The Witness: No, sir.

Q. (By the Court): What was your position?

A. I was a salesman.

Q. (By Mr. Eisner): How long have you been connected with the Sunset Sternau Food Company?

A. All my life. I mean all my working—ever since I have been working.

Q. Well, just——

A. Since I got out of school.

Q. Well approximately how many years?

A. Approximately 35 or 40 years.

Q. And during at least ten years of that period the Sunset Sternau Food Company was engaged in the business of buying [199] apricot kernels and manufacturing them into paste, wasn't it?

A. Yes, sir.

Q. I am asking you if during that period the Sunset Sternau Food Company did not make numerous purchases of regular apricot kernels.

A. Probably did.

Q. I will ask you, Mr. Sternau, if in those purchases of regular apricot kernels the deliveries were not limited to five per cent of broken kernels?

(Testimony of Sidney Sternau.)

A. I do not know. I did not handle that business at all, the buying, sampling or any part of it, so I cannot answer your question.

Q. That is the best answer you can make to that question? A. Certainly.

Q. Now then, Mr. Sternau, when you received plaintiff's Exhibit 10, which is the letter dated September 8, 1955 in which Prince, Keeler and Company reported to you that Mr. Kaplan stated that it was the regular custom for the clause "merchandise not to exceed five per cent by weight of broken kernels" to be inserted in the contract, did you make any inquiry to ascertain whether or not that was the custom of the trade?

A. We contacted the man who was doing the shelling—we tried to contact him, and he told us he couldn't meet it.

Q. Now, just a moment. That isn't answering my question. [200]

Mr. O'Connor: Let the witness finish the answer, Counsel.

Mr. Eisner: I think he did finish the answer and it wasn't in response to the question.

The Court: Reframe the question.

Q. (By Mr. Eisner): I am asking you, Mr. Sternau, after receiving this letter of September 8, 1955 in which it is stated that there is this custom of the trade, I am asking you if you made any inquiry of anybody to ascertain whether that was the regular and established custom of the trade.

A. We contacted Mr. Bonzi who was doing the

(Testimony of Sidney Sternau.)

shelling, who told us he couldn't meet that requirement.

Q. Just a moment, Mr. Sternau. Would you kindly listen to the questions. I am not asking you what you contacted Mr. Bonzi and asked him if he he could meet; I am asking you if you made any inquiry of anybody to ascertain whether or not the statement in the letter of September 8, 1955, was an accurate statement: that it was the regular custom of the trade for a tolerance of five per cent of broken kernels to be the maximum that could be contained in a delivery of regular apricot kernels.

A. The only one I contacted was Mr. Bonzi who was going to do the shelling and who we were selling the kernels for.

Q. Just a moment, Mr. Sternau. You can answer this question yes or no. Did you make any inquiry to ascertain whether or not the statement in the letter of September 8, 1955, [201] was an accurate statement and that it was the regular custom of the trade for that tolerance to be included.

A. No, outside of Mr. Bonzi.

Q. Mr. Sternau, after you received the letter of September 8, 1955, you didn't make any reply to that letter of September 8, 1955, until September 21st, 1955, did you?

A. That is correct.

Q. That was the first reply that you made?

A. Yes.

Q. In other words, when you received the letter

(Testimony of Sidney Sternau.)

of September 8, 1955, you didn't make any reply to Prince, Keeler and say that that isn't the regular custom of the trade or anything of that character, did you? A. No, sir.

Q. And on September 21st, 1955, you then wrote plaintiff's Exhibit No. 11. A. Correct.

Q. And in which you stated that "we just had the packer in who was going to shell the apricot kernels and he advised me that he cannot guarantee five per cent pieces; that they cannot be any better than the sample. He is having a very difficult time in shelling these and would like to get out of this contract this season.

"Please advise us if you are able to do it. It will be a personal favor if it is possible to assist this man in [202] setting up his plant right away. Please advise me by Monday about this."

Q. Now, Mr. Sternau, when you refer to "the packer who was just in," with whom you had the conversation, are you referring to Mr. Bonzi?

A. Yes, sir.

Q. Now, Mr. Sternau, was Mr. Bonzi a packer?

A. Yes.

Q. Packed what?

A. He was going to crack these apricot kernels.

Q. A packer. Mr. Bonzi is in the business of buying refuse, isn't he?

A. He is, but he had a plant he was going to set up; he had the equipment; he was going to shell these kernels himself.

Q. Just a moment, Mr. Sternau. The business of

(Testimony of Sidney Sternau.)

Mr. Bonzi was buying refuse from canneries, was it not?

A. I believe he is in several businesses. We call him a packer; he is a trucker; he is a refuse, garbage hauler. He does a lot of things; he is a jack of all trade.

Q. Let me ask you, Mr. Sternau, on September 21, 1955, when you wrote this letter, did Mr. Bonzi have a cracking plant to crack apricot kernels?

A. He had the plant; he didn't have it set up. He had the equipment but he did not have it set up?

Q. Had he ever cracked apricot kernels? [203]

A. No, sir.

Q. Did he have any plant that was ever in operation? A. No, sir.

Q. Now you brought with you, you stated, when you went to New York some apricot kernels; is that correct? A. That is correct.

Q. How large a sample did you have?

A. Oh, it wasn't over a pound.

Q. Who cracked those kernels?

A. I couldn't tell you.

Q. Where did you get them?

A. I got them from Mr. Bonzi.

Q. You don't know how they were cracked?

A. No, I couldn't tell you where they were cracked or how they were cracked.

Q. Were there any broken kernels in that sample? A. I don't remember.

The Court: What was the date of that again?

(Testimony of Sidney Sternau.)

Mr. Eisner: That was in July of 1955 when he went to New York and he said he had a sample with him.

Q. Did Mr. Bonzi give you that sample before you left for New York? A. He did.

Q. Mr. Sternau, you received the request from the American Almond Products Company for a larger sample, didn't you? [204]

A. We did.

Q. Did Mr. Bonzi crack that sample?

A. No, he did not; the Continental Nut Company of Chico cracked that sample.

Q. The Continental Nut Company of Chico cracked the sample. So, so far as you know, had Mr. Bonzi ever cracked any apricot kernels in his entire experience?

A. I couldn't answer that question because I don't know.

Q. And then when you wrote the letter of September 21st, you referred to this packer, Bonzi, as having great difficulty in cracking these apricot kernels and reducing the percentage of broken kernels to less than five per cent; is that true?

A. That is correct.

Q. Now, Mr. Sternau, this letter of September 21, 1955, was written after the fire at Sewell Brown & Company, wasn't it?

A. That is what I understand today.

Q. Now do you mean to say that the fire occurred at Sewell Brown and Company on September—when did it occur—September 19th or 20th?

(Testimony of Sidney Sternau.)

A. I don't know.

Q. Do you mean to state that if the fire occurred on the day before or two days before and you didn't know that the fire had occurred at Sewell Brown and Company?

A. I did not, because we are not interested in apricot kernels to any great extent. [205]

Q. And when Mr. Bonzi called at your place of business on September 21st and said that he wanted you to get out of this contract, did Mr. Bonzi say at that time that the fire had occurred at Sewell Brown and Company?

A. Mr. Bonzi didn't call at our office; our Mr. Hanshaw went down to visit him and get an answer, and he didn't make any reference to this fire.

Q. Were you present?

A. I was not present.

Q. Then how do you know he didn't make any reference to this fire?

A. Mr. Hanshaw would have told me if he did. We didn't know about it.

Q. You state in this letter "we just had the packer in." You wrote this letter yourself. That isn't true; the packer wasn't in your place of business?

A. I think I called him in the office after that and wanted an explanation from him.

Q. After that——

A. After Mr. Hanshaw made the report.

Q. On that same day?

A. On the same day.

(Testimony of Sidney Sternau.)

Q. Then Mr. Bonzi came into your office?

A. Yes.

Q. And you had a conversation with him? [206]

A. Yes.

Q. Did Mr. Bonzi in that conversation tell you that a fire had occurred at Sewell Brown and Company's plant? A. No, sir.

Q. Did he tell you why he wanted to get out of the contract?

A. Yes, because he couldn't set up his plant—get his plant set up.

Q. Now, Mr. Sternau, you weren't going to do anything about the cracking of these kernels in your plant, were you? A. No, sir.

Q. So the reason Mr. Bonzi wanted to get out of the contract was because he was having difficulty in setting up his plant? A. Yes, sir.

Q. Had he made any attempt to set up his plant?

A. I think he contacted several machinists and he wasn't able to get it set up, as far as I know.

Q. Who told you that?

A. Mr. Bonzi and the machinists. We were talking to them——

Q. Now, Mr. Sternau, this was in September, right about September 21st, that you wrote this letter. About September 23rd, just a couple of days later, Mr. Kaplan was out here and telephoned you, didn't he? A. Yes, sir.

Q. And did you tell Mr. Kaplan that it would

(Testimony of Sidney Sternau.)

be a favor to you if he could get someone to crack the kernels? [207]

A. At the present time I don't recall the conversation.

Q. You don't remember what the conversation was?

A. No; I know he called me and talked to me about cracking the kernels but I don't remember the whole text of the conversation.

Q. Don't you remember anything about the California Packing Corporation?

A. Yes I think he mentioned their name to me.

Q. Did he tell you that he had arranged with the California Packing Corporation to do the cracking of the kernels operation for you?

A. He might have told me, because I remember he said he could get them cracked.

Q. Did he ask you to get in touch with the California Packing Corporation and make your arrangements so as to get the matter concluded and finalized? A. I believe he did.

Q. Thereafter, Mr. Sternau, did you ever get in touch with the California Packing Corporation to find out if you could have your kernels, the kernels that you expected to deliver, cracked by the California Packing Corporation?

A. No, we never did.

Q. Did you ever communicate with Mr. Kaplan and say that you weren't going to communicate with the California Packing Corporation? [208]

A. No.

(Testimony of Sidney Sternau.)

Q. You simply then relied upon Mr. Bonzi to do the cracking; is that correct?

A. Yes, sir.

Q. And Mr. Bonzi never set up his plant to do any cracking.

A. Yes, sir. No, he never set up his plant.

Q. He never set up his plant? A. No.

Q. And therefore, because Mr. Bonzi did not set up his plant to do any cracking, you didn't make any delivery of apricot kernels; is that correct?

A. Mr. Bonzi—Mr. Bonzi had to deliver them to us.

Q. Mr. Bonzi was going to deliver to you?

A. Yes, and we were——

Q. And Mr. Bonzi didn't deliver to you?

A. Correct.

Q. And you didn't deliver to the American Almond Products Company?

A. That is correct.

Q. Now then, Mr. Sternau, you do recall, you have testified that in your conversations with Mr. Kaplan you told him that your price for the apricot kernels that you would sell, wanted to sell, would be competitive; is that right?

A. That is correct.

Q. The end of August 1955 Prince, Keeler telegraphed you to [209] the effect that the price had been announced and that Mr. Kaplan said that the price prevailing and the opening price was seventeen cents; isn't that true?

(Testimony of Sidney Sternau.)

A. That is true.

Q. And you telegraphed back, is it not a fact, that the price was not 17 cents but was 18 cents; is that correct? A. Correct.

Q. And when you telegraphed that back you had ascertained that that was the price of regular apricot kernels, hadn't you? A. Yes, sir.

Q. And then you agreed over the telephone, or your business, the company, did with Prince, Keeler and Company, to fix the price at 17 and a half cents; didn't you? A. Yes.

Q. Now, then, Mr. Sternau, when you agreed that your price would be competitive at *and* seventeen and a half cents, the same as the others, did you expect to deliver apricot kernels of any different quality than your competitors were delivering?

A. We expected to deliver apricot kernels; we never mentioned our competitors; the sale, what they are going to deliver.

Q. You said that your price would be competitive.

A. Competitive price; we never said anything about quality.

Q. If your price was going to be competitive, did you expect to deliver any different quality or lower quality than your [210] competitors at the same price were charging?

A. We only sold apricot kernels; not regular apricot kernels.

Q. You knew that broken kernels were sold for the purpose of making oil, did you not?

(Testimony of Sidney Sternau.)

A. No, I did not.

Q. You knew that broken kernels were sold for far less price than whole kernels, didn't you?

A. We sold apricot kernels; we didn't sell apricot kernels pieces. The contract called for apricot kernels subject to approval of the sample.

Mr. Eisner: I think that is all, if the Court pleases.

The Court: Step down.

Mr. O'Connor: Just a few questions, your Honor.

Redirect Examination

Q. (By Mr. Connor): Mr. Sternau, when Sunset Sternau Food Company was making apricot paste, who was the head of the corporation?

A. Clarence Sternau, my brother.

Q. He died in 1947, didn't he?

A. He did.

Q. Who handled the office details of the purchasing and so forth? A. He did.

Q. And following his death who handled them?

A. Richards—Mr. H. S. Richards.

Q. Did Mr. Richards handle them likewise when Clarence Sternau was alive?

A. No, he didn't; Clarence Sternau handled them.

Q. Did you have anything to do with purchasing apricot kernels or making the paste or anything of that sort? A. No.

Q. Prior to your brother's death?

A. No, only the selling.

(Testimony of Sidney Sternau.)

Q. You did only the selling for the firm?

A. Yes, only the selling of the kernel paste; we never sold kernels.

Q. After the fire at Sewell Brown did you attempt to get any further reply from Mr. Bonzi concerning any delivery to you under a verbal contract of the apricot kernels?

A. Yes, we did.

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial, not proper redirect examination. Any conversations that he might have had with Mr. Bonzi would be purely hearsay.

Mr. O'Connor: It is already hit upon in cross examination, if the Court please, as to what he did with Mr. Bonzi:

The Court: Let the question and answer stand. Let's proceed.

Q. (By Mr. O'Connor): Mr. Sternau, did you yourself, or any [212] member of the firm at the time in 1955, have any familiarity at all with the customs prevailing so far as apricot kernels are concerned and their sale and purchase?

A. None whatsoever.

Mr. O'Connor: I think that is all.

Your Honor, there have been admitted certain letters which I wrote. If counsel will waive any bar to my appearing in this action, I would ask at this time to be sworn as a witness and testify. Any question, counsel?

Mr. Eisner: No; I will waive any objection to your testifying.

RAYMOND J. O'CONNOR

called as a witness for the Defendant, having been first duly sworn, testified as follows:

Mr. O'Connor: With the permission of the Court, I would prefer to make the statement and counsel can cross-examine just in the interests of saving time, in connection with Plaintiff's Exhibit No. 18, the letter of October 31, 1955, which I directed to Mr. Rudy Bonzi, and I believe a letter of November 3rd, which is in evidence——

Mr. Eisner: I think you better ask the question, so that I may know what the question is directed to.

Mr. O'Connor: Very well.

Q. Did you on October 31st, cause a letter to be directed to Mr. Rudy Bonzi? [213]

A. Yes.

Q. Prior to the sending of that letter, did you have a conference or telephone call from Mr. Sidney Sternau respecting the Bonzi matter?

Mr. Eisner: That is objected as irrelevant, incompetent and immaterial and hearsay.

Mr. O'Connor: The letter has been introduced, if the Court please. The Court has admitted it into evidence.

The Court: For what purpose?

Mr. O'Connor: It has been admitted as part of plaintiff's case, your Honor.

The Court: Read the letter.

Mr. O'Connor: The letter reads as follows—a letter directed to Mr. Rudy Bonzi, Route 4, Box 3115, Modesto, California:

“Dear Sir: This office represents Sunset-Sternau

(Testimony of Raymond J. O'Connor.)

Food Company of Modesto. We have been advised you authorized the company to sell on your behalf 75 tons of shelled apricot kernels. The company has made the sale per your instructions at 17½ cents per pound. The buyer has requested that they be advised of the shipping date.

“Efforts to reach you apparently have been un-availing for the past week. It is absolutely essential that you get in touch with the company [214] upon receipt of this letter, and complete the transaction. If this is not done, it will expose both the company and yourself to liability and sale with right of the company to go against you for any loss that may be sustained by reason of non-delivery.

“Will you therefore kindly get in touch with the company immediately upon receipt of this letter.”

The Court: That is dated what?

Mr. O'Connor: October 31, 1955. I submit that the question respecting my information for writing that letter is pertinent in view of the fact that the Court allowed it to be introduced in evidence in the plaintiff's case.

The Court: The letter will have to speak for itself.

Q. (By Mr. O'Connor): Mr. O'Connor, were you advised by Mr. Sternau of a verbal contract with Rudolph Bonzi for the sale of apricot kernels which were to be in turn sold by the company to the American Almond Company on or about the date of this letter?

(Testimony of Raymond J. O'Connor.)

Mr. Eisner: That is objected to as irrelevant, incompetent and immaterial and hearsay.

The Court: Objection is sustained.

Mr. O'Connor: I will make an offer of proof, if the Court please.

The Court: Make a record on it.

Mr. O'Connor: That by the question just asked—— [215]

The Court: I sustained the objection. The record will have to speak for itself.

Mr. O'Connor: Very well; then I offer to— well, I will withdraw that.

Q. Were you at the time that you wrote this letter, Mr. O'Connor, in receipt of all the documents or any of the documents relating to the transactions between Sunset-Sternau Food Company and American Almond Company?

Mr. Eisner: Same objection, if the Court please; the documents speak for themselves.

The Court: I will allow it.

A. No, I was not.

Q. (By Mr. O'Connor): With reference to the letter of November 3, 1955, which has been introduced as Plaintiff's Exhibit No. 23, a letter addressed to Mr. Rudy Bonzi, Route 4, Box 3115, Modesto, California, were you at the time of the writing of that letter, Mr. O'Connor, in receipt of, or did you have in your possession any of the documents or correspondence between the American Almond Company and the Sunset-Sternau Company with reference to apricot kernels?

(Testimony of Raymond J. O'Connor.)

A. No.

Q. When did you first obtain the documents with reference to those dealings?

A. November 8, 1955.

Q. Did you have a telephone conversation with Mr. Eisner, [216] representing American Almond Products Company on or about November 14, 1955?

A. Yes.

Q. What was the subject matter—where was that telephone conversation held?

A. San Francisco.

Q. What was the subject matter of that conversation?

A. Mr. Eisner had either telephoned me and I returned his telephone call—the subject was a meeting to be held by—Mr. Kaplan being present in San Francisco, Mr. Eisner desired a meeting with Sunset-Sternau Food Company, and myself, in Modesto the following day with Mr. Sternau and with Mr. Bonzi.

It is my recollection that Mr. Eisner had at that time either himself arranged for the interview with Mr. Bonzi's attorney or the arrangement was made through the office of Sunset-Sternau.

I told him I had no objection to such a conference but that, due to a previous court commitment, I could not be present; that in order to settle any question that might arise out of the correspondence and in order to help his client, who was apparently a customer of the Sunset-Sternau Food Company, and Mr. Berke of Prince-Keeler, we

(Testimony of Raymond J. O'Connor.)

would attempt to get Mr. Bonzi at such a meeting and try to get the apricot kernels for his client; but that nothing was to [217] be discussed at that conference in my absence relative to any liability of Sunset-Sternau for delivery of any apricot kernels to American Almond Products Company—or American Almond Company, I believe it is.

Q. Did you have further telephone conversations with Mr. Eisner on the subject matter of this action?

A. Yes. On November 16th, Mr. Eisner telephoned me and told me that efforts to obtain the kernels from Mr. Bonzi had proved fruitless and that he had a copy of the letter which had been written, I believe on the same date, November 15th or November 16th, and he had been advised Bonzi would not sell to American Almond Products, and I advised him at that time that if that was the fact, Sunset-Sternau could not help them any further, and that so far as negotiations were concerned, we were sorry, but we felt that there was no obligation on the part of Sunset-Sternau.

Mr. O'Connor: No further questions.

Cross Examination

Q. (By Mr. Eisner): In this conversation, Mr. O'Connor, of November 16, did you say that if action was filed against Sunset-Sternau Food Company, that you were going to implead and file a cross-complaint against Bonzi?

A. I believe that at that time I did mention

(Testimony of Raymond J. O'Connor.)

that we would try to get Bonzi in this action. I think you are correct in that. [218]

Q. And is it a fact, Mr. O'Connor, that after the action was filed, I called you on a number of occasions and asked you if you wanted to bring Mr. Bonzi in as a third party defendant and that I was holding the action in abeyance to give you that opportunity if you so desired.

Mr. O'Connor: Well, I will have to object to that question on the ground that it is improper cross examination, incompetent, irrelevant and immaterial, so far as the issues in this action are concerned.

The Court: The objection will be overruled.

A. I don't recall that you said that you would hold the action in abeyance, Mr. Eisner. I think the discussion was on the basis that I was giving some thought as to whether or not Mr. Bonzi could be held by Sunset-Sternau because of the fact that there had been no written contract between Sunset-Sternau and Bonzi of any kind.

Q. My question, Mr. O'Connor, was whether or not you stated in this discussion with me, that you wanted an opportunity to implead Bonzi. That was the question?

A. That could be. I think that I did take and give considerable thought to whether or not Bonzi could be properly impleaded.

Q. Just what the conversation was; I am not asking you what you thought.

A. It could be. Yes, it could be. Well, whether

(Testimony of Raymond J. O'Connor.)

you held up the action in abeyance, that I can't agree to. I don't [219] think the action was held up, necessarily.

Mr. Eisner: No further questions.

Mr. O'Connor: No further questions.

The Court: All right. Is that the case?

Mr. O'Connor: Yes, that is the defendant's case, your Honor.

The Court: On both sides?

Mr. Eisner: Yes, your Honor.

(Thereupon the matter was continued for argument following five, five and five days for submission of briefs.) [220]

Monday, March 25, 1957—10:00 A.M.

The Clerk: American Almond versus Sunset-Sternau, for argument and submission.

Mr. Eisner: May I proceed?

The Court: Will you indicate what time you wish to take?

Mr. Eisner: Well, there are a number of exhibits, if the Court please, that I would like to call attention to. I probably won't take it, but I would like an hour's time.

Mr. O'Connor: Oh, if counsel is going to take an hour, your Honor, I think I can cover it in a half hour. I wouldn't want to be bound by it. I will try to. I think most of the matters have been covered by the briefs to date.

The Court: I have read all the cases.

Mr. O'Connor: I have taken the occasion to

write up a supplemental brief by way of reply.

The Court: Proceed.

Mr. Eisner: If the Court please, your Honor will recall that this was a case of sale of 75 tons of regular apricot kernels in August of 1955. Mr. Sternau, President of the defendant, in company with a representative of his broker, Prince-Keeler and Company, Inc., of New York, called upon Mr. Kaplan of the American Almond Products Company, the plaintiff in the action, and stated that he would have apricot kernels, regular apricot kernels, for sale. He had a small sample with [221] him of those kernels at the time. He said, as to price, that his price would be competitive and that there would be approximately 75 tons that he could offer.

Mr. Kaplan stated that the sample looked all right, the small sample that he had, but in order to properly test the quality of kernels in his plant for manufacturing purposes, he would have to have a larger sample of approximately 200 pounds submitted to him.

Thereafter the price of regular apricot kernels was announced in the market, and the broker wired Mr. Sternau, or the company, that the price had been announced, that Mr. Kaplan said that it was 17 cents a pound and that he was ready to buy the 75 tons of apricot kernels.

Mr. Sternau wired back that the market price of regular apricot kernels was not 17 but 18 cents a pound, and then there was a telephone conversation between Mr. Sternau, the defendant, and

Prince-Keeler and Company, and the price of 17½ cents was agreed upon.

Then the 200-pound sample was forwarded by the defendant to the American Almond Products Company, and on the first of September, 1955—this was immediately after the telephone conversation between Mr. Sternau and Prince-Keeler and Company—Prince-Keeler and Company sent a letter to the defendant which is Exhibit 7, and in this letter he said this:

“Confirming today’s phone conversation with you, [222] we immediately contacted the buyer, Mr. Kaplan, of American Almond. He felt that due to the fact that you fellows were new in the business, he should get a slightly lower price than the current price. However, he went along with us, paying your price of 17½ cents; in fact, he was most cooperative.

“Now, then, since we are both in this deal, we made it our business to find out authentic details on the method of operation. For your information, we found out that some packers supply DFA certificates and some do not. Terms are always sight draft 2 per cent f.o.b. dock California. With regard to shipping and packing, this is designated on enclosed contract, which we believe will meet with your approval. If there are any further questions on this, do not hesitate to contact us. We certainly are glad to be able to close this business, and thank you for your cooperation.”

Now, then, the enclosed contract that was sent on September 1st, 1955, was this Exhibit 8. This

Exhibit 8 is a broker's memorandum. He issued bought and sold notes—a bought note to the buyer and a sold note to the seller, identical in form, setting forth all of the terms of this contract. And at the bottom of this contract there is this provision:

“This memorandum shall be subordinate to a more [223] formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties.”

Now then, this was sent to Mr. Sternau, the Sunset-Sternau Food Company, on September 1st, 1955. They retained this memo without objection, without exception or any question.

Then on September 6, 1955, Sunset-Sternau Food Company prepared what is in evidence as Exhibit 9, which is a formal contract covering the same transaction, based upon the broker's memorandum, and sent that to Prince-Keller and Company.

When this was received by Prince-Keller and Company, the sample of 200 pounds had just that day been received by American Almond Products Company—thereabouts—and it was stated that the sample had been tested, that it was satisfactory and approved. But attention was called to the fact that there were in this sample an inordinate number of broken pieces. And at the same time that this conversation occurred, Mr. Sullivan told him that he had received a formal contract from the Sunset-Sternau Food Company, which he was sending him.

Mr. Kaplan asked, is there included the regular provision in this contract that the broken pieces shall not exceed five per cent by weight? He said "That has always appeared, either expressed or implied, in every contract. In many instances it is included, and I would like to have it included in this. And will you ask that it be done?" [224]

Then on September 8, 1955, that same day, Mr. Sullivan wrote Mr. Sternau as follows:

"Mr. Kaplan of American Almond Products Company, Inc., phoned today to advise that the two 100-pound bags of apricot kernels were received and found satisfactory with one exception—the broken kernels far exceeded the normal tolerance. We advised him that we were mailing your formal contract 2023, received today. However, during the discussion, he advised that he had overlooked the following standard clause: 'Merchandise not to exceed five per cent by weight of broken kernels,' and requested that we add this on our contracts and return yours for the same addition. He advised that all regular suppliers, namely, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumed it would be included as a matter of course in your contracts. We are therefore returning your contract No. 2023 as enclosure and would appreciate your authorizing the addition of the above clause in compliance with the buyer's request. Awaiting your advice in this matter, Yours very truly, Prince-Keeler and Company, Inc."

Now when on the stand, Mr. Kaplan explained and stated that [225] Mr. Sullivan had not given a completely accurate statement of what he told him. He told him that it is always a recognized condition of the contract of sale, that Calpak includes it, but not all others, but when omitted, it is implied.

For example, we have in evidence in this case, if the Court please, contracts of Rosenberg Bros. and Company, in evidence here. I mention it at this time in passing. It is Exhibit No. 43, such a contract, in which there was this purchase and in which there is no mention of it. But as stated and testified by the expert witnesses, both of them, and by Mr. Kaplan, it is always an implied term of the contract.

We have also in evidence the contract of Mayfair Packing Company, which is also for regular apricot kernels, in which there is no mention of the percentage of broken kernels. We have also the exhibit, the contract of sale by California Prune and Apricot for apricot kernels, and in this case it is rather interesting that in the broker's memorandum it is recited, "Not to exceed 5 per cent weight broken," but in the normal contract that followed it, there is no mention of the five per cent broken kernels. It was implied.

And in the case of Sewell Brown and Company we have the broker's memorandum, which was the only evidence of the contract, in which there is no mention of the percentage of broken kernels. But it is always an implied term of the contract.

Now then, this letter which I have just read, if the Court [226] please, is dated September 8, 1955, and in which this tolerance which is always a part of the contract, is mentioned.

Now then, did Mr. Sternau of the Sunset-Sternau Food Company make any reply to that letter? Did they state, "Well, we want to look into it to find out if this is an implied term of the contract"? Did they say, "We are not agreeing to that as being an implied term of the contract"? Did they say, "We question it"?

No, by no means, if the Court please. And I call the attention of the Court that when the deposition of Mr. Sternau was taken, and even when he was on the stand, in corroboration, this question was asked of him:

"Q. Now, Mr. Sternau, after receipt of this letter, did you make any inquiry to ascertain whether a five per cent limitation by weight of broken kernels was the custom and usage in dealing with this product?"

His answer was: "I don't remember."

Now Mr. Sternau didn't have to make any inquiry of anybody else to ascertain that that was the regular custom of the trade, if the Court please. As a matter of fact, just at this time I may mention, it was most interesting at the time of his examination, when upon the stand he admitted that while he had not sold this particular product, that his concern had for years been engaged in the business of buying apricot [227] kernels and in processing them, and in the same manner that the

plaintiff in this action processed them, making them into a paste.

Now then, this letter that I have just referred to, if the Court please, is dated September 8th, and it wasn't until September 21st—from September 8th to September 21st—and after the fire had occurred, that that letter was replied to. And I call the Court's attention to this letter of September 21st, 1955:

“Dear Bill: (to Prince-Keeler and Company, Mr. Berke) We just had the packer in who was going to shell apricot kernels, and he advised me that he cannot guarantee five per cent pieces, that they cannot be any better than the sample.”

If the Court please, the packer he is referring to here is Bonzi, who was a garbage man, and with whom he had, or Sunset-Sternau Company had, a deal whereby they were jointly going to act in the shelling of these apricot kernels.

Now I want to mark this statement: “He is having a very difficult time in shelling these and would like to get out of this contract at this time, this season. Please advise us if you are able to do it. It will be a personal favor if it is possible to assist this man in setting up his plant the right way. Please advise by Monday about this.” [228]

Now as we go through these exhibits, if the Court please, they constitute a complete answer to every contention that the defendants can make in this case. The defendant in this case didn't question the fact of the broker's memorandum being delivered. It didn't question the fact of going to

New York and offering the sample and saying his price would be competitive. He doesn't question the fact that, without contradiction, the witnesses have testified to the existence of this regular custom of the trade which have existed for years—a most unusual case, if the Court please, in which there isn't a contradiction or any conflict in the evidence. Not even Mr. Sternau has assailed or attempted to contradict the existence for years and years of this established custom, or that it is the regular practice even of the Dried Fruit Association of California not to issue a certificate to pass regular apricot kernels unless they are within this tolerance.

Now then, the contentions that are urged by the defendant in this action are these:

It says that the broker's memorandum issued by the broker was not authorized in writing; that the broker did not have the authorization to issue the broker's memorandum, therefore the broker's memorandum, not being in writing, authorized in writing, is within the statute of frauds.

The second contention is that a written contract was intended to follow this broker's memorandum, that there was to be no contract until and unless there was a formal executed [229] contract; and no formal executed contract having been executed, there is no contract.

And the third contention is that we are not bound by this custom of the trade, this regular established custom, because we were not familiar with it.

Now then, if the Court please, as we go through these exhibits, we will see how the recognition of the existence of this contract answers each and every one of these contentions. If, for example, there was to have been no contract until and unless a written contract was executed, then there wouldn't have been a contract to be recognized as in existence.

The fact of the recognition of the contract, time after time, in writing by this defendant, is a complete ratification of the existence of the contract, and of the authority of the broker.

And as we have mentioned, if the Court please, there is also the element of estoppel, because the defendant in this case has repeatedly, until November 16, 1955, promised, time after time, to recognize the contract, and make delivery.

Now then, no merchant can recognize a contract and carry on and promise to make deliveries under it and then wait until the price rises, when it isn't to his advantage to make delivery, and then say there is no contract under which he promised to make delivery,—because, forsooth, it was not in writing. [230]

Now then, if the Court please, I have just read this letter of September 21st, which was written after the fire, and this is the letter in which they say they want to get out of a contract. And when in his deposition I asked Mr. Sternau, "What contract are you referring to when you say that he wants to get out of this contract?" this is what he said; this is the question on Page 24:

"Q. 'He is having a very difficult time in shelling these and would like to get out of this contract this season.' This contract that you refer to in this letter is the contract with the American Almond Products Company for 75 tons of apricot kernels?"

"A. Yes."

Now then, if the Court please, while we are upon this letter, I want to indicate, he says that these packers are having a difficult time in shelling these.

Now when he was on the stand—Mr. Sternau—I asked him: "So far as you know, had Mr. Bonzi ever shelled any apricot kernels, ever in his life shelled any apricot kernels?" and he said no.

"Who shelled the sample that was sent on?"

"The Continental Nut Company."

Now then, as a matter of practice, having a difficult time, where you can't do any better than five per cent, I call the Court's attention to the fact that in getting the [231] merchandise within the tolerance, it isn't a great problem if you are cracking and your cracking isn't good. All you have to do is to have the girls pick out the pieces. You can always comply with your agreement if you want to. It is simply a matter of cracking the kernels and he is having a very difficult time.

As a matter of fact, he never had any time; he never cracked any. He never tried to crack any. He wasn't prepared to crack any. So that statement is simply one made in order to lay a foundation to try to get out of the contract.

Now then, if the Court please, the next exhibit I want to call attention to is Exhibit 12, and this is

a letter also from the defendant in this action. This is what he got. This is from Prince-Keeler and Company.

The Court: Date?

Mr. Eisner: The date of this letter is September 28, 1955; it is from Prince-Keeler & Company:

"Just finished speaking to Mr. Jack Kaplan of American Almond Products, who advised me that you would agree to the following during your discussion with him on his recent visit to California. It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged through the kindness of Mr. Carroll Glenn of Calpak for Mr. Engell, Calpak's plant manager, to shell the apricot kernels which we sold American Almond for [232] your account. It is certainly fortunate that Mr. Kaplan had connections in Calpak; otherwise would we have been in a mess with this good buyer! Jack Kaplan was most co-operative in this matter.

"We will appreciate your keeping us informed concernig shipping information in this matter."

Now then, your Honor will recall the testimony that when Mr. Kaplan came out here after the fire and he telephoned to Mr. Sternau and Mr. Sternau said he would make delivery of the apricot kernels and that he was having difficulty in getting someone to crack them, and Mr. Kaplan said, "Maybe I can help you" and then Mr. Kaplan got in touch with Calpak and arranged for Calpak to shell them, and then phones Mr. Sternau back and told him that he had arranged with Calpak and Mr. Engell

to do some cracking, and he should get in touch with Mr. Engell.

And if your Honor will read that deposition—I am not going to take my valuable time for that purpose now—you will see what Mr. Sternau, when his deposition was taken, denies under oath, notwithstanding that these letters which refer to these conversations were called to his attention—denied that any such conversation had taken place with Mr. Kaplan.

The next letter, the next exhibit that I want to call attention to, if the Court please, is Exhibit 13. This letter is dated October 12, 1955, and is written to Prince-Keeler and Company. [233] I want to call attention to this. It is addressed to “Dear Willie”—that is William Berke:

“Personally I think the Assorted Nut Company * * *” and so forth; that has nothing to do with this case, is another matter.

He says: “The same thing goes to the American Almond Products. They are doing us no favor in getting Calpak to shell the apricot kernels (referring to the arrangement that was made); they are doing themselves a favor because they bought them at a low price and they wanted delivery.”

Now if that isn’t a recognition of the fact that a contract was made and that there was a purchase and that the buyer was trying to assist them in making delivery because they wanted delivery—assist them—I don’t know of any other answer that can be made to that. It is just perfectly obvious.

And your Honor will recall, so far as this written

formal contract was concerned, when Mr. Sternau received that back on September 8th or thereabouts, they simply put it in their files. They didn't send it back and say, "We want this contract signed in the form that we sent it, or there will be no contract." They didn't say anything of that kind. They put it in their files and recognized the fact thereafter, time after time—although that was not executed—that they had a contract under which they were obliged to deliver. [234]

Now the next exhibit I call attention to is Exhibit No. 14, which is a wire from Prince-Keeler and Company to Sunset-Sternau:

"American Almond insists on knowing when you are delivering apricot kernels per our order 912079, which was confirmed by you."

Now then, when they received that order, and Order No. 912079 is the broker's memorandum which is in evidence, did they answer back and say to Prince-Keeler and Company, "What do you mean by saying we confirmed your order? What do you mean by their wanting delivery?"

Was there any answer to that? I will show the Court the answer in a moment. But in the meantime I refer to a letter that they received, that Sunset-Sternau received directly from American Almond Company, which is Exhibit 15, in which it is stated on October 25, 1955:

"Dear Mr. Sternau: With reference our contract for apricot kernels of 9/1/55, you recall that on my recent trip to California, we had an opportunity to talk about the matter on the phone. At that

time you indicated to me as a result of Sewell Brown Company's loss of cracking plant by fire, you were attempting to accomplish your cracking out of pits with other people, and asked if I could be of some help. As you know, I immediately obtained the cooperation of California Packing Corporation. [235] Mr. Carroll Glennly stated that he was arranging with Mr. Raymond Engell, Calpak plant's manager, to accomplish the crack out for your account at some future date which would be convenient for both parties, details to be finalized between you subsequently.

“At this time I would appreciate hearing from you as to the existing arrangements insofar as we might be posted on approximate shipping dates of kernels on contract. We do not mean to press you for prompt shipment, but we do need some confirmation from you on the approximate schedule in order that we plan our own affairs intelligently.

“Please be kind enough to give us a prompt reply and accept our thanks for same.

“Very truly yours, American Almond Products Company.”

All the references to their contract and reference to that conversation which Mr. Sternau denied existed or ever took place, although this letter was called to his attention and he was asked if it didn't refresh his recollection that there was such a conversation.

Well, he didn't reply to that letter, if the Court please, and as your Honor will recall, he never got

in contact with the California Packing Corporation. [236]

Now the next letter that I want to call attention to is a very important one. There isn't any answer to all of this, if the Court please.

Under the authorities, if the Court has had an opportunity to look at them, your Honor will find that so far as a ratification is concerned, an individual may, in referring to a contract that has been made—may say, "I don't recognize it; I refuse to perform in it."

But if he refers to it as an existing contract, it is a confirmation and a ratification of it.

And here in this case it goes beyond anything that could be imagined of a recognition of a contract. I call the Court's attention to this Exhibit 17. It is a letter dated October 31st, 1955, addressed to Prince-Keeler and Company:

"Dear Bill:

"In reply to your letter of October 26th (that is, in which the contract was referred to) wish to advise you (mark you this) and you can advise American Almond Products, that we are trying to get a commitment from a man with whom we are working on the apricot kernels. We are trying to arrange for the delivery. We have not written you because we have nothing to tell you. We have this man on the telephone every day for the past ten days, asking him to come to this office, but he has not done so, and today we are turning the matter [237] over to Mr. O'Connor to try to get a commitment from this man."

Now listen, though, to these words:

“We acted in good faith, and I know the buyer bought in good faith and that you sold in good faith, and we are going to do everything possible to get this matter settled within the next ten days.”

Now then, there just isn't any answer to such a recognition. There isn't any possibility of saying, “Well, there wasn't any contract because it wasn't a formal contract, a formal contract wasn't executed.”

There isn't any basis to contend, “Well, the broker's memorandum does not constitute a contract because there wasn't a prior authorization in writing.”

Now then, if the Court please, the statement was made in the letter that it was turned over to Mr. O'Connor. Now Mr. O'Connor is not only an astute attorney, but he is an officer of the defendant corporation. And Mr. O'Connor then wrote the letter to Mr. Bonzi which is Exhibit 18:

“Mr. Rudy Bonzi:

“Dear Sir:

“This office represents Sunset-Sternau Food Company in Modesto. We have been advised that you authorized the company to sell on your behalf 85 tons of shelled apricot kernels. The company has [238] made the sale per your instructions at 17½ cents per pound. The buyer is requesting that they be advised of the shipping date.

“Efforts to reach you apparently have been unavailing for the past week. It is absolutely essential that you get in touch with the company upon

the receipt of this letter to complete this transaction. If this is not done, it will expose both the company and yourself to liability on the sale, with the right of the company to go against you for any losses that may be sustained by reason of non-delivery."

Now the next exhibit is also a letter that I call attention to, from Mr. O'Connor to Mr. Bonzi. It is dated November 3, 1955. It is Exhibit 23. It says, being addressed to Mr. Bonzi:

"Dear Sir:

"Apparently you have disregarded my letter of October 31, 1955, re the sale made by Sunset-Sternau Food Company of 85 tons of your apricot kernels.

"You are advised that American Almond Products Company, Inc., which purchased these almond kernels, has advised Sunset-Sternau Food Company that they are going to file suit for damages for failure to abide by the contract calling for delivery of these almond kernels. You are advised that [239] Sunset-Sternau Food Company will join you as a defendant in any action filed by the Almond Products Company, Inc. You are further advised that in any event, suit will be filed against you for your breach of this contract by Sunset-Sternau Food Company for damages sustained by them in connection with your failure to abide by your contract.

"It is possible that such legal action may be avoided by you immediately contacting Sunset-Sternau Food Company and arranging to ship the

apricot kernels to the purchaser, provided, of course, we can obtain the consent of the purchaser to accept shipment at this late date."

Now the next exhibit I want to call attention to is the exhibit next in number, No. 24, and it is dated November 4, 1955, and is written by Mr. Sternau to Prince-Keeler and Company.

I call the Court's attention to these words:

"We have turned over to Mr. O'Connor all the information we have regarding the sale of apricot kernels, and we have placed it all in his hands. Please be assured that we will cooperate in every way possible with American Almond Products to get delivery."

In other words, they were promising, recognizing the [240] contract and promising delivery, time after time, while the market was rising and going up.

Now the next that I would like to call attention to is a very important letter, written by Prince-Keeler and Company. Prince-Keeler and Company had read the letter to plaintiff that they were going to make delivery, and this is what they say in reply; this is the letter from Prince-Keeler and Company to Sunset-Sternau:

"We quote from a letter received today from American Almond Products Company: 'Your order * * * (and so forth) We have this day received your letter of November 3rd on above matter, confirming your telephone call of November 2nd. We confirm hereunder our reaction to same; that is, that the delivery was going to be made, they were

doing everything. Seller indicates we are going to do everything possible to get this matter settled within the next ten days."

Remember, that was the letter from Sunset-Sternau to Prince-Keeler, and he says, "You can advise American Almond we are going to do everything possible to get it settled within the next ten days. Accordingly we will refrain from taking any action whatsoever in this matter pending the seller's telegraphic notice to us not later than November 10, 1955."

In other words, they would wait on it now, another of their promises of making delivery. [241]

On November 14, Sunset-Sternau Food Company wired Prince-Keeler and Company:

"Had very nice talk with Kaplan, who was conferring with O'Connor today."

Your Honor will recall that about November 14th, Mr. Kaplan came out to California, and Mr. Kaplan and myself went down to Modesto to try to see if delivery could not be had of these apricot kernels, and we left down there on about November 14th,—still promising delivery.

And then, if the Court please, it was not until November 16th, after that meeting, when the attorneys for Bonzi advised Sunset-Sternau Food Company that Bonzi was not going to make delivery of the apricot kernels, that, on November 16, 1955, for the first time, the Sunset-Sternau Food Company advised American Almond Products Company through the process of going through Mr. O'Con-

nor and then to myself, that delivery would not be made.

And this advice was based on Exhibit 32, which is the letter from the attorneys for Mr. Bonzi to Sunset-Sternau Food Company. He says:

“This will confirm my telephone conversation of earlier this afternoon with Mr. Hanshaw of your organization. Due to your past and continued failure to keep your agreements with my clients (that is addressed to Sunset-Sternau), Mr. Rudy Bonzi, Mr. Bonzi is of the [242] opinion that he is unable to crack any apricot pits during this season and thus is unable to delivery any apricot kernels to you or to your purchaser, the American Almond Products Company. We regret that this turn of events has been made necessary by your conduct, as we had looked forward to a profitable production in this line of merchandise.

“Very truly yours.”

Then it was, if the Court please, that there was the refusal to deliver.

Now then, if the Court please, so far as the contentions are concerned that this is an unusual case, in that there is practically no contradiction in the facts; we have here the recognition time after time in writing, as definitely as anyone could imagine, of the existence of the contract.

We have the repeated promises to make delivery.

We have the unquestioned proof and undisputed proof of the existence of this custom of the trade.

And so far as the contentions are concerned re-

garding the broker's authority not being in writing; if the Court please, we have the ratification of it time after time.

The principle of law is an elemental one, if the Court please, that, where there is intention of the parties that there shall be no contract unless it be reduced to writing, of course then there is no contract unless it is reduced to writing. [243] But where there is that intention—whether there is such an intention is a question of fact and people cannot play with it—they cannot blow hot and blow cold about it. And here we have in this case, in the very broker's memorandum, the recital that unless a formal contract is executed, this is the contract.

And we have the fact that there has been no attempt thereafter to have the formal contract executed, but kept in the file; and the recognition time after time, proof by conduct of both parties, that there was no intention that the execution or the existence of a contract should be conditional.

Now then, so far as this custom is concerned, if the Court please, counsel argues, well, this custom has been proved, and particularly in the case of, I think it is, Mr. Engell of the California Packing Corporation, he testified that in the case of the California Packing Corporation, they put it into their contract. Yes, that is the practice of the California Packing Corporation. But he testified that that custom has existed for years, beyond his own experience, which is over 25 years in this business. He testified that always regular apricot

kernels cannot have an unlimited percentage of broken kernels over 5 per cent.

Then we have the representative of Rosenberg, who had an equally long experience, testifying that it is not the practice of Rosenberg Brothers, but it is always a recognized implied term of every contract pertaining to regular apricot kernels. [244] And the fact that in so far as the Dried Fruit Association is concerned, that no contract for regular apricot kernels, no delivery will be recognized or certified if a percentage of broken kernels exceeds that amount.

Now then, if the Court please, we have the law upon the subject, which I have quoted in brief. First of all, where one engages in a trade, where there is a regular and well established custom of that trade, he is bound by that custom of the trade whether he personally knew of the custom or he didn't know of the custom. Now may I suggest here, if the Court please, the absurdity if it would be otherwise. Here Mr. Sternau entered this field, and let's assume that he was ignorant of it—which he wasn't, of course, ignorant of it at all. And assume he goes and offers to sell regular apricot kernels and he says, "My price is going to be competitive with other sellers of regular apricot kernels." And the American Almond Products Company, if your Honor will recall, purchased at exactly this same price, 17½ cents, at the same time, from the California Packing Corporation, and the California Packing Corporation representative testified that they made delivery notwithstanding the

fire and notwithstanding the fact that the price went up.

Now then, if the Court please, if one enters a trade and sells a piece of merchandise which, according to the regular established custom of the trade, has a certain standard of [245] quality, in this instance that you can't have an unlimited number of broken kernels, that you must not exceed 5 per cent, and he is asking the same price for his merchandise that other dealers in that trade demand for that product, which has a regular, recognized standard of quality, and then when he comes to make delivery of his merchandise for which he is asking the same price, and he says, "I am not going to deliver to you that quality of merchandise, I can deliver to you any number of percentage of broken kernels, because I didn't know about that custom," well, when you enter a trade and assume to deal in a product pertaining to that trade, you can't plead ignorance of the customs of that trade pertaining to what it is, and the quality of it, and you can't deceive your buyer by saying, "Well, I didn't know about that custom of the trade."

So, if the Court please, as a matter of law, as the authorities establish, which we cite in the brief, it is entirely immaterial as a proposition of law, where a general custom of the trade existed, whether the particular seller who went into the matter knew or didn't know about this custom of the trade. But in this instance he did know of the custom of the trade. He knew of the custom of the

trade because, if the Court please, he didn't have to inquire about it, he never disputed it. When it was written to him in all of the correspondence, and all of the conversations, he didn't say [246] then that the custom doesn't exist. He said in one letter that Bonzi was going to have difficulty in getting down to the tolerance and making delivery according to the tolerance. He didn't say that he was not bound by tolerance. He just said he was going to have difficulty. And therefore I would like to get out of this contract, he said. But the fact was, of course, as already indicated, that Bonzi did not have difficulty in meeting that tolerance—he didn't even ever attempt, make any attempt to meet the tolerance, and he could have met it if he wanted to.

And then, if the Court please, when Mr. Sternau was on the stand, he was asked the question, "I mean, did Sunset-Sternau Food Company make purchases of regular apricot kernels?"

"Answer: Yes.

"Question: Was the Sunset-Sternau Food Company in the same business as the American Almond Products Company, of making paste out of these apricot kernels?"

"Answer: Yes."

Well now, they knew perfectly well, and that was the reason, if the Court please, that he didn't have to inquire, because they knew as to what it was.

Now, if the Court please, so far as the measure—this is a case simply of a seller who had a deal with a particular producer with whom he attempted to

work. Difficulty developed between Bonzi and Sunset-Sternau. The market went up. [247] Sunset-Sternau tried to get out of the contract and failed, while promising delivery time after time; at the same time it was pressing upon Bonzi directly and through counsel to come through with the delivery. But Bonzi did not do so. This garbage man wouldn't cooperate. So not being able to get delivery from Bonzi, Sunset-Sternau says, "I won't deliver to you." And that statement wasn't made until November 16, 1955. And according to established law, the measure of damages is the difference between the market value at that date of the refusal of delivery, which was the first refusal to deliver, and the contract price. And there is no dispute in this case that the market price on November 16, 1955, was 43 cents a pound.

So if the Court please, I submit that the plaintiff in this action, I mean we have the excuse, of course, which is nothing. I mean, we have a direct contract here, and the plaintiff is entitled to recover the difference between the contract price and the market price on that date. I think there is a slight difference; in my opening brief I mentioned a few hundred dollars difference in the prayer, in the allegation of the market value, and the 43 cents, and I have asked leave to amend the Complaint to conform to that proof, which is undisputed, that the market value was 43 cents a pound.

The Court: I will now direct you to the clock.

(Recess.) [248]

Mr. O'Connor: If the Court please, I am con-

strained to agree with counsel in the present proceeding that there isn't too much by way of contradiction in the factual situation before this Court. In connection with the interpretation of the factual condition, there is a vast difference of opinion.

We have here a situation in which there is pleaded a contract as of a certain date. The Plaintiff sets forth in his complaint that as of September 8, 1955, there was a definite contract between the Plaintiff and the Defendant. As an integral part of that contract, the Plaintiff states that there was a custom which attached a condition or a clause to that contract. In other words, the so-called note of memorandum of Prince, Keeler, is not complete in and of itself, says the Plaintiff, but attached to it, added to that contract, is a trade usage or custom that this Court must find to be the fact. These facts we dispute. There is likewise the statement, of course, that Prince, Keeler & Company were the agents of the Defendant and could bind the Defendant and did bind the Defendant in the contract or sales memo which is dated September 1, 1955, and which was supplemented by a contract received by Prince, Keeler from the Defendant himself.

Now what are the facts? The facts are simply these, and they are uncontradicted, and they come within the evidence [249] submitted by the Plaintiff in this case. No. 1, there is no question but what from the evidence in this case before this Court, the defendants were new in this business. And that that fact was known to the Plaintiff in

this case. It was known, under the testimony of Mr. Sternau when he first had his conversation in July, in the middle of July, with Mr. Kaplan of the American Almond Company, and showed him the small sample that he had of the apricot kernels. It was confirmed by Mr. Kaplan in his talk with Mr. Sullivan, with Mr. Berke of Prince, Keeler Company, referring to Plaintiff's Exhibit No. 7, under date of September 21st, and the Plaintiff in this case stated to Berke, "We immediately contacted the buyer, Mr. Kaplan, of American Almonds. He felt that due to the fact you fellows were new in the business, he should get a slightly lower price." And he goes on to say, "Now then, since we are both new in this field, we made it our business to find out certain things"—the certificate and so forth—the terms. Then significantly, in a letter of Prince, Keeler of September 8th, signed by Mr. Sullivan, addressed to Sunset-Sternau Company, he states:

"Mr. Kaplan of American Almond Products phoned today to advise * * *" (and so forth.)
"* * * the 200 pound bag of apricot kernels were received and found satisfactory with one exception—the broken kernels far exceeded the normal tolerance." [250]

Then we come to this paragraph:

"We advised him that we were mailing your formal contract 2023 (which is Plaintiff's Exhibit No. 9 in this action) * * * received today. However, during the discussion he advised that he had overlooked the following standard clause: 'Mer-

chandise not to exceed 5 per cent by weight of broken kernels,' and requested we add this on our contracts and return yours for the same addition. He advises that all his regular suppliers, that is, Calpak, Rosenberg, insert this clause, which is a recognized condition of sale for this particular item. It was not brought up before because he assumes that it would be included as a matter of course in your contract. We are therefore returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request."

Now, question: At that point, September 8th, which is the determinative date, the Plaintiff has set forth a contract in this case. We have two things which are before the Court: No. 1, was that sales memo a contract which was binding upon the defendant? And we have the position of the Plaintiff that Prince, Keeler were acting as the agents and could bind the defendant. And yet, significantly, in that letter they state, "We are returning your contract * * * we will appreciate your authorizing the addition of the above clause." [251]

Again, an affirmation of the fact that they had a limitation of authority, that they were unable to bind the Plaintiff on any of those matters. We have further a letter from Prince, Keeler, which is Plaintiff's Exhibit No. 16, the question of their authority to bind this defendant by means of this particular sales memo or any sales memo. And I quote from that letter:

"The buyer has our sales memo and no one knows better than I do when dealing with Sunset that every price is subject to confirmation from Modesto."

Mr. Eisner: Just a moment, Counsel; that doesn't refer to this contract, does it?

Mr. O'Connor: It does not, but it states that general authority.

Mr. Eisner: I just want you to make that clear, that when you said——

Mr. O'Connor: It refers to another contract, that's true. Now, however, the Plaintiff put this letter in, I didn't. Then it goes on to say, and this is significant in this case, on the second page:

"I do not know what your opinion is on the subject (referring to the subject matter, the general subject matter of this letter, which was not the apricot kernels), but I think we have tried to co-operate with you all the way right down to our contracts. We printed special contracts just for Sunset [252] which eliminated the arbitration clause, et cetera. Wonder how many of your other brokers have done this."

Now here they have the arbitration clause. Here is a recognition, if this Court pleases, that this particular type of sales memo itself was not authorized by the Defendant to Prince, Keeler. We have the fact, if the Court pleases, that they sought authorization to add a term to that particular contract, the 5 per cent clause. That authorization was never given. We have the fact, if the Court pleases, that throughout the correspondence, throughout the ne-

gotiations, the Plaintiff himself knew the limitation of authority on the part of Prince, Keeler to bind the defendants. In 1954, and we have in evidence Exhibit B, Exhibit A, the contract 2023, which was mailed by the defendant to Prince, Keeler immediately upon receipt of the sales memo, showing that in the ordinary course of business, which was testified to by Mr. Sternau, that upon receipt of those sales memos, they make up their own contract, they send it back for signature, by the buyer. And the same contract was signed by the Plaintiff in 1954, and during the very time that these negotiations were going on, may it please the Court, the Plaintiff purchased other products from this defendant, and they signed the same identical contract. And as a part and parcel of that contract, and as a definite knowledge put upon them of the limitation of authority of Prince, Keeler, we have Section 13 of that [253] contract, which is in evidence, which states, "This contract is executed in triplicate. No broker or buyer has authority to alter the contract in any way. Broker is not authorized to sign for seller." There are other terms which the defendant insisted in all cases be made a part of the formal contract between the parties.

Immediately upon receipt of the sales memo and following the ordinary course of business, they did transmit Plaintiff's Exhibit 9 to the brokers to forward to the buyer in this case. The buyer refused to sign it, because it didn't contain that particular clause. He knew that he had to sign such a contract, that that was the ordinary course of business

with Sunset-Sternau. He rejected it and had it sent back for inclusion of this clause.

Now the statement has been made by Counsel that the Defendant kept that memo, and that fact is significant. Well, why wouldn't they keep it? In the ordinary course of business, if they regarded it as merely a sales memo, subject to confirmation by a formal contract in writing, it would certainly keep it. It would keep it just as it would a letter or any other communication on the current subject matter. It kept it as part of its record, it returned its own contract, and when its contract was returned to it under date of September 8th, counsel says it is significant that it did not immediately reply to the letter of September 8th, written [254] by Prince, Keeler, who was the middleman and not the broker in this case. Not an agent of the Defendant, and not an agent of the buyer. There's no demonstration here that Prince, Keeler, for example, was authorized to sign on behalf of the Plaintiff in this case. There is no affirmation that there was authority in any way, shape or form, save and except as it suits their present purposes.

Now the course of conduct; there had been long lapses between the correspondence, as your Honor will note from the file, and the original letters of July 25th on through. On September 21st, the letter was written, and Mr. Sternau testified that he did finally, through one of the employees, contact Bonzi with reference to whether or not Bonzi could deliver under the 5 per cent broken kernel clause, and he was told that he could not. Now where does

that leave the contract? Leaves the contract here, if the Court pleases, that the terms of the offer originally made were not accepted by the Plaintiff. It proposed a counter offer, a counter contract, differing from the terms, because the broken kernels in the sample far exceeded the normal tolerance of 5 per cent. Now was the contract at this point, on the date September 21st, the admission that delivery could not be made under that clause—was that binding upon both parties? Was there any enforceability by the Defendant and against the Plaintiff? There was none, because of its [255] admitted inability to deliver under that clause. The letters that follow are merely attempts to close a deal which was still subject to a formal writing between the parties and this is confirmed, if the Court please, in the reply brief of the Plaintiffs in this case, namely, that there was at all times an uncertainty about the subject matter of this contract. On page 9 of the contract, of the reply brief, here is the language of Plaintiff:

“Certainly defendant could not expect to demand and receive the prevailing price for apricot kernels with the limited percentage of broken kernels, and deliver an inferior product with an unlimited percentage of broken. It would be absurd to hold that one could undertake to sell and receive the going price for a product where the recognized standard of quality in the trade is not bound to deliver that standard of quality because of ignorance on his part of the customs of the trade. (Sic).”

Now that brings us down, if this Court pleases, to what the Plaintiff considers to be an integral portion of this contract, the addition to this contract of a custom of the trade. Suppose we grant, for the purposes of argument, that the 5 per cent was a custom of the trade. The next question comes up, did the Plaintiff then, in connection with the very contract it asserts is a contract and is binding upon this defendant, say, "That's the complete contract." We rely on—on September 8, 1955—we rely upon this exhibit, [256] the bought and sold notes. Is that contract complete on that date? Do we rely on the fact that included in that contract is the 5 per cent clause? Oh, no. They demand of Sullivan, of Prince, Keeler, that there is to be added in writing to this contract the so-called 5 per cent clause, and Prince, Keeler, on the other hand, goes to the defendant and says, "We want your authorization," which they never received.

Now in order to serve their own ends, they now say, "Now it is a custom that attached." And yet it is put in their own witness, Mr. Engell's testimony, in connection with the 5 per cent clause, and I am reading from page 11 of the transcript of this testimony, as follows, where I questioned the witness:

"Question: Mr. Engell, was the clause put in these particular contracts with American Almonds at their request?

"Answer: It is common procedure and a customary practice to put the clause in, because it is not printed in the contract.

“Question: It is common procedure and customary practice to put that clause in a contract?”

“Answer: It is accepted by the industry in all dealings that we make.

“Question: And it is the customary practice to put it into the written contract, is that correct?”

“Answer: Yes.” [257]

Cross examination by Mr. Eisner—or further re-direct:

“Question: Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers Company, such as Sewell Brown & Company, to expressly include such a tolerance clause or to let it be implied?”

Now I made an objection, and the Court allowed the answer. The answer was: “I know that other companies do use that clause.”

“Mr. Eisner: Question: Do they include it or do they not include it? I mean, expressly?”

“Answer: I would say they include it.”

I then withdrew the objection.

“Question: Are you personally familiar with whether or not Rosenberg Brothers & Company expressly include the clause?”

“Answer: That I couldn’t answer correctly other than what knowledge I have gained through association with the sales department, to the effect that other companies use the 5 per cent broken clause.”

From the lips of their own witness they have produced a custom, but they have proved a custom

far different from the custom that they have asserted in their pleadings, and which we had to meet. They have proved that it is customary in the trade that that clause is added in writing to the formal [258] contract.

Now Counsel made a point in his argument that others, namely Rosenberg Brothers and the like, do not include it in their contract. But they issue a certificate. And he stated the truth—I took down his words—when he said the certificate he refers to is a certificate issued only when the tolerance of broken apricot kernels does not exceed 5 per cent by weight. So if they issue the certificate, that is proof that the buyer—it proves to the buyer that the product does not exceed 5 per cent by weight of broken kernels.

Mr. Eisner: You misunderstood, Counsel. Just a moment. Rosenberg and no seller issues a certificate.

Mr. O'Connor: No, certainly, that's correct.

Mr. Eisner: The certificate is issued by the Dried Fruit Association, where a certification is requested.

Mr. O'Connor: That's correct.

Mr. Eisner: I mean, I don't want to interrupt, but I wanted to have your statement correct.

Mr. O'Connor: That is a correct statement. In other words, the product is examined and the certificate is issued, if it doesn't exceed 5 per cent. It is the same thing. In other words, the custom which is pleaded here, if the Court please, is that a condition was added to this contract, and they haven't

proved that condition. If it please this Court, that custom is a necessary part of this contract in order to make this [259] contract whole. Your Honor will recall that I asked a question of Mr. Kaplan whether or not they ever waived it, and he stumbled a bit.

Mr. Eisner: Ever what?

Mr. O'Connor: He stumbled a bit on the answers. There was never any written waiver at any time by the Plaintiff in this case of the necessity of that clause being in the contract. That was their demand, it was never fulfilled. They never again requested that, either Prince, Keeler or the Defendant to see that the contract be amended, that they be returned to them with the 5 per cent broken clause in there. And why? Because a fire had occurred, and they were trying to get delivery of anything they possibly could. No question about that. It is an unfortunate situation, it is unfortunate from both standpoints; but the fact is that the defendant couldn't comply with that condition, and that is the reason it never authorized it.

Now so far as the law on custom is concerned, I have cited cases and authorities in my brief which I think fully sustain the position we take, namely that there isn't any contract, and there isn't a custom proved, a custom that would add a condition to a contract. The cases cited by counsel for the Plaintiff in this case are all to the effect that custom and usage will be used to interpret the written words of a contract. In other words, there are [260] trade terms, as your Honor knows, in the

various industries and what might appear to be a jumble of words to the ordinary person not in the industry has a definite and concise meaning within that particular industry or business. And trade custom and usage is ordinarily applied to interpret those terms. There is definite price and quality and so forth, represented by symbols which the particular trades indulge in. That is the common and ordinary usage of trade custom and conditions. And trade customs and trade usages.

But here the Plaintiff has gone one step further and says, "We add this clause to it because it is universally the trade custom." I will submit that the authorities which I have cited and which have not been replied to in the reply brief of the Plaintiff in this case, are unquestioned, and that they don't prove the custom. They have an incomplete contract. They have nowhere proved the authority of Prince, Keeler to bind the defendant on the sales memo. Specifically, the evidence which has been produced, and which I have directed the Court's attention to, both in the brief and presently, is all to the effect—evidence put in by them, in so far as this case is concerned—that it definitely limits the authority of Prince, Keeler. Prince, Keeler, after all—what is their position here? They are a middleman, they are a broker. As they say in one of their letters, their position is put pretty clearly there, that they don't represent either side.

In Exhibit No. 27, in the brief of Plaintiff, they would have your Honor believe that Prince, Keeler were actually the agent and entitled to bind the

defendants, and that there could be a subsequent ratification. I have cited the definition of middleman, and in those cases, in California, which govern and control this case, it shows that Prince, Keeler in this case, is nothing but a middleman. They never purported to bind the defendant. Their sales memo was not even authorized by their own testimony, by their own evidence. But here is a letter, November 9th, which is Plaintiff's Exhibit No. 27:

"Dear Sidney:

"As you know, brokers are supposed to represent both packer and buyer. And under these conditions, we must be fair to both."

Now how could they represent both? If they have no written authority? It is a definite indication that they are the middleman, and the cases so hold, and I have cited to your Honor that they are merely the go-betweens between buyer and seller. They are used to forward the negotiations. Their offices are used to forward the completion of a binding contract between both buyer and seller.

In this case, if the Court pleases, there is no question but that Mr. Kaplan was fully aware of the position of the defendants with respect to its newness in the business. In the [262] reply brief of the Plaintiff, on page 9, he states, "Incidentally, Mr. Kaplan did not know what the defendants knew or did not know about the customs of the trade. All he knew was that it was his first transaction of this character with the defendant."

Now the argument and the presentation of the

case, because of the letter of September 8th, and the letter of September 1st written by Prince, Keeler after conversations with Mr. Kaplan in which they say that, Kaplan says that, "You are new in the business and therefore we should get something below market price for the use."

No. 2, in the letter of September 8th, where Kaplan again affirms that they are new in the business and he wants this clause written in. There is no question about it. Mr. Kaplan knew very well the limitations of the defendant in this case, and he knew very well the limitations of Prince, Keeler and their authority. He had had dealings with the defendant before, he knew that they had their own contract, and that it had to be forwarded from Prince, Keeler to himself for signature because he signed it. And during the very time these negotiations were going on for the sale of these apricot kernels, he signed another contract, which is in evidence, which put him upon notice of the limitation of authority of Prince, Keeler, and put him upon notice of the ordinary business practices of this defendant. [263]

What this amounts to is simply this. He knew that the defendant had an oral commitment with a fellow named Bonzi, and that they were relying upon him as their supplier. He knew that. Once he learned that, he never asked again for an amendment, the inclusion of the clause. He was going to depend upon the custom and trade and entrap the defendant by writing these letters and having Prince, Keeler write them for him. And he did.

What do the letters amount to? They amount to this, if the Court please. They amount to an attempt by the defendant in this case to consummate a sale; a question of ratification? No, because he couldn't comply in the original instance with the 5 per cent. But he still negotiated, hoping to complete a sale. This profit for him relieves the tension and the threat of a lawsuit. If you can't write letters for the purpose of trying to avoid any lawsuit, no matter what the merits of the lawsuit are, then it is a poor penalty upon those who are put in that position with the threat of a lawsuit. And very frankly, the letters which I wrote were in view of the fact that there were threats of lawsuits from Prince, Keeler and so forth. Why get into a lawsuit if you can get out by getting a delivery of some kind or other sufficient to satisfy somebody so they won't file suit? But as an admission of responsibility, no. If there was an admission of responsibility here, then was there ever, conversely, on the part of the Plaintiff, a waiver, in [264] writing, saying, "You can't deliver under the 5 per cent, but we are desperate now, because of this fire, and we will take anything you have got?" Oh, no, he didn't do that; he kept silent and he never did waive that. And it was contemplated by the parties here, may it please the Court, from the very inception of this deal through Prince, Keeler, that the formal contract would be reduced to writing. It was never reduced to writing. I cited the case of *Spinney vs. Downey*, which is controlling in California, which is still

recognized as the authority and cited in countless cases it came down. And that case, even though one party had signed the contract and had performed under it, the Court said the other party was not bound because they definitely contemplated the signing of a contract, a formal contract with all the terms in it. And that there was no estoppel created to plead the statute, and that is the holding of case after case that followed that decision, and follows it to this very day. The case of *Spinney vs. Downey* is controlling in California.

I have cited numerous cases on the question of custom and usage. And one who pleads custom and usage in an attempt to add a condition to a contract must show that at the time of the contract, this date, September 8th or September 1st, the date that this formal bought and sold note was made and issued, did he rely upon it? The answer is, he did not. And if he doesn't rely upon it, and if he wants it [265] included in writing, then can he now come in and plead that custom in order to make a complete contract? I think I fully answered it. The authorities I have cited, which I see no reason at the time of oral argument to repeat, so hold. But I respectfully submit to this Court that the subject matter and the conditions of this contract are still uncertain.

Question: Is the Plaintiff willing to accept broken kernels by more than 5 per cent? On the witness stand he said no. It wasn't because they were useless to him. They are an integral part of these contracts. And no trade custom inter-

venes to complete that contract. There is no contract. By their own pleading that has to be the answer, that there isn't any custom, may it please the Court, which has been amply demonstrated by the fact that the Plaintiff himself did not rely upon it at any time until the action was filed. But at the date he says a contract was complete, September 8th, he wasn't in reliance upon that custom. And for the Court, the problem is, can the Court in a matter of this kind then implement the parties' negotiations and say this or that shall be added? The authorities are to the contrary, that a Court will not intervene and add to a contract that which was not contemplated by the parties. Will the Court in this case add to the bought and sold note the conditions of the formal contract of the defendant, which the defendant sent to the broker to be signed and which contain very definite [266] provisions which the defendant wants in all its contracts, and which was acceded to on at least two occasions by the plaintiff himself? I don't believe so. But in order to make the contract complete between the parties the defendant is entitled to have some conditions attached. The conditions that it insists upon, in the normal course of its business.

This is not a case, if the Court pleases,—we have pleaded the statute of frauds because there wasn't any written authority of any kind or description given to the brokers by the defendants. None. The record is completely silent. Conversely, there is no written authority given in any way, shape or

form by the Plaintiff to the brokers to bind them. The evidence is complete upon the limitation of the brokers' authority in this case, even going as to this type of a note, that they had no authority to even issue this type of a note, but had special contracts for this defendant. This defendant is in California, these people are in New York. They are dealing at arm's length. This is a middleman. It is easier for him to maintain good relations with somebody in the immediate area than in the distant province of California. It isn't as if, may it please the Court, there has been a fraud perpetrated deliberately, wilfully, that one party has gained an advantage and another suffered a disadvantage. There is no question but in this case that the defendant has not received any advantage. There is a question, has the plaintiff [267] suffered any detriment?

Up until the time of the fire, now, the Plaintiff was so anxious to have this contract—if he was so anxious, to have it reduced to writing, and have that clause included, and he didn't receive any word by September 15th or 16th or the 20th, or something of that sort, then you would think, in the normal course of things, he would call Prince, Keeler and say, "Listen, where is that contract?" But did he do so? No. There was an ample supply of these things on the market, these kernels. But it was after the fire which destroyed—no question about it—the stock pile of this particular type of merchandise, and then and then only did he become insistent upon delivery under any conditions.

But not waiving the 5 per cent, nor ever again requesting that Prince, Keeler return this memo note with the condition on it which he had requested them to return to him. And in the letter of September 1st or September 8th, that that memo note be amended, and on its face, the 5 per cent clause be added to it. Never again did he refer to that. And he had definite and good reason. He is trying to recoup his loss at the expense of someone who was entirely innocent of a willful, deliberate wrongdoing, who was trying to complete a deal in a decent fashion. Can't do it; tries right up to the end. They had contracts with Bonzi, they came out here to see Bonzi. Bonzi saw the market going up, and so, not having any written contracts to be bound by, he is taking [268] advantage of the market.

Question: Should the defendants in this case be penalized when they have never received anything, and where these people were put upon notice of the difficulties he was having? The letters are to be taken as ratification? If they are, then I respectfully suggest to the Court that businessmen would never do business in writing, that they would do it all verbally so they could deny it. Yet in the ordinary course of business by correspondence, the imposition of a penalty upon a person who tried to do a job and complete a sale, knowing full the circumstances. And yet we have certain legal phases and conditions which must be met, and the burden is upon the Plaintiff, and that is the burden of proving the contract, the burden of proving the

custom. And I submit to the Court they have failed in the proof of each.

The Court: How much time do you wish?

Mr. Eisner: Five minutes.

The Court: All right.

Mr. Eisner: I mean, I don't need very much time, if the Court please.

The Court: What's that?

Mr. Eisner: I don't need very much time. I don't know what the——

The Court: You may change your mind before I get through. Proceed. [269]

Mr. Eisner: Well, would your Honor rather adjourn now until 2:00 o'clock?

The Court: Oh no, I am here to serve both you gentlemen.

Mr. Eisner: Well, I mean——

The Court: I had in mind this, that we go over until this afternoon and give both sides any time they wish. That is on the law side, now. In relation to the authority of the broker. Do I make myself clear?

Mr. Eisner: Yes, your Honor.

Mr. O'Connor: Yes, your Honor.

The Court: Also the law in relation to custom. Is there anything else that you gentlemen have in mind?

Mr. Eisner: I think probably the law relating to estoppel would be of value.

The Court: What is it?

Mr. Eisner: The law relating to estoppel.

The Court: Very well, add estoppel to the prob-

lem. Now in relation to pleading, Counsel calls my attention to the fact that you pleaded the eighth day of what?

Mr. Eisner: The 8th day of September.

The Court: Of September?

Mr. Eisner: Yes.

The Court: Now suppose the contract wasn't completed until October, where would we find ourselves?

Mr. O'Connor: Find ourselves in quite a different [270] position, your Honor.

Mr. Eisner: Well——

The Court: I call these matters to your attention in good faith, so that both sides will be prepared.

Mr. Eisner: Very well, we will be here at 2:00 o'clock.

The Court: Yes.

Mr. Eisner: All right.

The Court: If I were you, I wouldn't eat any lunch to interfere with your work. Let me say to you gentlemen that I don't think we will be here, we wouldn't be here if it wasn't for the fact that we had a fire.

Mr. O'Connor: That's correct.

Mr. Eisner: You don't? Well——

The Court: I say that kindly.

Mr. O'Connor: I think that is true.

Mr. Eisner: I don't know about that. If the Court please, Mr. Engell testified——

The Court: Well, I am giving you my state of mind, and I am not always perfect myself.

Mr. Eisner: Well, yes. Of course, the fire would

make—I don't think it makes any difference, if the Court please, what was the cause of it.

The Court: No, only the market.

Mr. Eisner: No—of the market going up?

The Court: You can't exclude that, and I wouldn't [271] exclude it, on the equitable side of this case. Counsel here depends upon the law, namely, that there wasn't a written contract.

Mr. O'Connor: That's correct, your Honor.

The Court: Period.

Mr. Eisner: I understand that, if the Court please, that he depends upon that. But he hasn't answered—Well, I won't argue the matter.

The Court: You are free to say anything you wish. Here I don't stand on ceremony. I want to get the best that's in you, to guide me here.

Mr. Eisner: I try to always give your Honor the best. But there isn't any attempt to answer the fact of the recognition of the existence of this contract, of the repeated promises to deliver under the contract, and, under the authorities, if the Court please, the broker's memorandum is by this recognition, ratified, beyond question.

The Court: Pardon? Repeated in many of these letters is the word "contract". What contract?

Mr. Eisner: Why, there is only one contract that is referred to, and that is the contract that was executed by the broker. As it said in the memo, "Unless it is succeeded by an executed contract, this broker's memorandum constitutes the contract."

The Court: You bring me some authorities on that. [272]

Mr. Eisner: Well, there are in the——

The Court: Well, you refresh my memory on it.

Mr. Eisner: I will do that, yes. And in other words, that it is regularly recognized that a broker in executing a broker's memorandum represents both buyer and seller in that respect.

The Court: I realize that. Take it a step further. How far can they go to legally bind either side? That's what we are into here.

Mr. Eisner: Well, they do legally bind. For example, in New York,—I mean a number of other states——

Mr. O'Connor: That's what we have been afraid of, New York. We have been afraid of that.

Mr. Eisner: Well, wait a minute. The broker needs no written authorization there. Under the California law, if the Court please, for the broker, there has to be either written authorization or ratification, and one is equivalent to the other. In other words, the broker's memorandum representing both parties, that's——

The Court: I understand they represent both parties. How far can they go to legally bind either side?

Mr. Eisner: They can go on to legally bind either side when that broker's memorandum is issued and accepted by both sides. In other words, when the broker issues his memorandum and that broker's memorandum, I mean of the sale, is delivered to the buyer and the seller, and is retained

[273] by the buyer and seller, that constitutes the contract, and it does so in every state, almost, except where there is a law.

Mr. O'Connor: Statute law.

Mr. Eisner: No, statute—almost a statute of frauds.

Mr. O'Connor: That's right.

Mr. Eisner: That the authority of an agent to execute a contract in writing must also be in writing. And therefore, if the Court please, that authority in writing can either be—and there is no dispute into the authorities. I have cited California cases, I have cited Federal cases, that where there is a recognition after the broker's memorandum of the existence of the contract, and that is in writing, even if the seller or the buyer says, "I am not going to comply with it," or something of the kind, that recognition of the existence of the contract constitutes a ratification and is in all respects equivalent to a prior written authorization, if the Court please. And that ratification is retroactive to the time that the broker has signed for the contract. So that if a broker signs, issues these brokers' memoranda, and if that broker's memorandum constitutes the written contract, if the Court please, if his authority in writing is either preliminarily given in writing or is ratified in writing, and it recognizes the existence of the contract after that broker's memorandum, then it is a ratification, and when your Honor says, "What contract?" all through, there is only one contract here, and [274] that is all that is referred to. That is the contract and couldn't have been a

contract unless, as recognized, it constituted the contract.

The Court: Now you see, you are put on notice, so you had better prepare yourself.

Mr. O'Connor: I think I have the answer in the authorities, your Honor.

The Court: So that either one of you are not in doubt about any phase of this case. I have got my mind open.

Mr. Eisner: Well, I appreciate that, your Honor.

The Court: And I can say to both of you, I can decide it either way.

Mr. Eisner: Well, I will be glad to be here.

The Court: That is the reason I am taking this afternoon to give you that opportunity.

Mr. Eisner: Yes.

Mr. O'Connor: Yes, I appreciate that, your Honor.

The Court: Now if there is any other question you want to ask me, I am here to try and answer them, so that——

Mr. Eisner: Well, it seems to me that the only defense that has been urged here is that——

The Court: Are you listening, Mr. O'Connor?

Mr. O'Connor: Yes, oh, yes.

The Court: Proceed.

Mr. Eisner: The only issue that is raised—usually [275] there is more in a case. Usually in a case of this kind there would be a question of market price. Usually in a case there would be a conflict, is there or is there not a custom?

Mr. O'Connor: Why question things which are obvious?

Mr. Eisner: Well, just a moment. Is there or is there not a custom? The evidence here is undisputed, if the Court please.

The Court: Why fix the market price here when it varies?

Mr. Eisner: Beg pardon?

The Court: How do you fix the market price here when there is variation?

Mr. Eisner: Well, by November 16th, if the Court please——

The Court: How do you fix that date?

Mr. Eisner: How do I fix that date?

The Court: I mean, the price.

Mr. Eisner: I mean that is the date as to the price. That is the date that was testified to, without dispute. Mr. Engell of California Packing Corporation, testified that that was the market price on that date that they sold.

The Court: How can you fix that date in relation to starting from the 17 and a fraction and going up?

Mr. Eisner: Well, it went up, if your Honor please, during——

The Court: You are establishing the high price.

Mr. Eisner: Well, that is the date. In other words, the date that is taken, if the Court please, and that is the undisputed law, the date that is taken is the date of the refusal to deliver. In other words, if the Court please——

The Court: Are we clear on that, Mr. O'Connor?

Mr. O'Connor: There is a question as to what the market price was on November 16th.

Mr. Eisner: No, I mean, but the Court is asking the law upon that question.

Mr. O'Connor: That would be so as of the date of refusal. There is a question as to the date of contract here too.

Mr. Eisner: I am speaking of the date of refusal. In other words, the——

The Court: That is the day to fix the price.

Mr. Eisner: That is the date to fix the price.

The Court: You have authority for that?

Mr. Eisner: Yes, no dispute about that.

Mr. O'Connor: There is no question about that.

The Court: All right. Then let him challenge it, then.

Mr. O'Connor: There is only one thing; that should be November 14th and not November 16th. We don't know what happened in the meantime.

The Court: What was the price on the 14th? The last date? [227]

Mr. Eisner: The last date, if the Court please, the 16th, it has been testified it was 43 cents. And there isn't any conflict in that.

The Court: Yes. And that is based upon 75 tons, is it?

Mr. Eisner: Yes, that's the price. That is the price per pound.

The Court: What would that amount to in dollars and cents?

Mr. Eisner: Well, I have it here.

Mr. O'Connor: Approximately \$38,000.

The Court: I want to be sure you have got some data on that.

Mr. O'Connor: Approximately \$38,000.

The Court: I am sure you have got some data on that.

Mr. Eisner: On the computation.

Mr. O'Connor: He has added it up very well, your Honor.

Mr. Eisner: Yes, I have a computation on that, and that was set forth in the opening brief, if the Court please. In other words, it is simply multiplying 75 tons by 43 cents and deducting the 17½ cents price under the contract.

The Court: Well, I am talking about dollars and cents. Now what is that amount?

Mr. O'Connor: \$38,500 roughly, your Honor.

Mr. Eisner: Yes, I think that's——

Mr. O'Connor: I checked the figures. [278]

Mr. Eisner: I am sure counsel has checked my figures on that to see that my figures——

The Court: Well, I am going to give you this afternoon to straighten that up. Now if you want further time, I will take it up at half past two or three, for this will be your last chance, gentlemen, and I am going to try and make up my mind when we conclude in this case, and I think the case will go forward in any event, for both sides have faith in their case, no matter how I decide it. Why, I think the Circuit Court will finally decide it, so protect your record. That is the only comfort I can give the losing party in this case.

Mr. Eisner: Well, let's say two o'clock, if the Court please. We will be here then.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [279]

Afternoon Session—2:00 o'clock p.m.

The Court: Proceed, gentlemen.

Mr. Eisner: Now I would like to address myself to the questions that the Court has asked for the law on.

The Court: I want to call your attention to the fact that you are looking very seriously at me.

Mr. Eisner: Looking very serious? Well, it is a very serious case. I have great respect for the dignity of the Court.

The Court: Now I know that you are doing the very best that you can under difficulties, and I am trying to do the same thing.

Mr. Eisner: Yes. Well, I really don't think I should be under difficulties. That is why I can't understand. I must have failed in some respect, because the facts——

The Court: Well, maybe you got too close to your case and smothered it.

Mr. Eisner: No, I don't think so. I think I have the case. Now then,——

The Court: Maybe I could help you.

Mr. Eisner: Well, I am always ready to have help.

The Court: You have indicated that this broker's memorandum is a contract.

Mr. Eisner: That's right. [280]

The Court: Well, it says "Subject to confirmation."

Mr. Eisner: Yes.

The Court: "Of seller".

Mr. Eisner: That's right.

The Court: All right. Now then, we come to the next step. What does this record show in relation to confirmation?

Mr. Eisner: Well, the record shows that the seller, the defendant in this case, has recognized and confirmed the contract time and again in his correspondence. In other words, in the first place, if the Court please——

The Court: Now pardon me. I don't want to interfere. The only reason I mentioned that was to set it out for the purpose of the record. Proceed, gentlemen.

Mr. Eisner: Yes. Your Honor has read part of the contract. The further part of it is, mentioned in this memorandum, that in the absence of the execution of a more formal contract, this memorandum constitutes the contract between the parties. Now it has been testified to without contradiction in this case, that it is the general practice of the trade, I mean of those in buying and selling merchandise, for sales to be negotiated by broker's memorandum, just such as this. And in confirmation, not only do we have the testimony of that, uncontradicted, but we have introduced into evidence to substantiate that broker's memorandum in exactly the same form, language—I am showing that [281] this is a

recognized, you might say, stereotyped form of broker's memorandum, exactly the same, in which American Almond Products Company made purchases of apricot kernels. And there were no other contracts executed other than the broker's memorandum.

Now then, your Honor, I mean, I know, is so familiar with the proposition of law that where it becomes a question of intention, there is no true guide to the intention of the parties, no truer guide than their conduct following the transaction. Now when Counsel was trying to argue, remember that this question of insufficiency of the execution of the contract was not raised any time between all of this correspondence, between the parties, nobody, the broker, nobody raised any question about whether or not there was a contract in existence. The broker, when he wrote the letter to the defendant, and sent this broker's memorandum, said, "I am enclosing the contract, which I trust will meet with your approval." All parties, the seller, the buyer, repeatedly, up to, we will say, after November 16, 1955,—everybody recognized that a contract was in existence. The seller promised, I mean, time after time, to make delivery and said, "I am going to get delivery to you in ten days." I am making delivery to you, he said. The buyer said, "All right, I will wait for you." The buyer makes a trip out here to get delivery, way in November, because promises have [282] been made at all times to make delivery—recognizing the contract.

Now then, Counsel is making two contentions.

These contentions can always be urged, but the answers are so clear in this case, if the Court please, that that is the reason it is an unusual case in that respect. Now a broker's memorandum is a frequent method of negotiating sales, and is so recognized. A merchandise broker represents both parties. I simply brought the corpus juris here in order to read the statement of the general principle of law upon that subject, your Honor. This is on page 705, volume 37, under the subject of "Statute of Frauds."

"Broker. A broker who negotiates a sale of goods, wares or merchandise, is an agent of both parties for the purpose of making and signing a memorandum of the contract of sale."

Now then, if the Court please, in addition to this, we have quoted from one of the, I mean, it is a general principle going back from a New York case here, which is so similar that I have taken it as a typical example. This was a case in which the trial court was reversed by the Appellate Division or Court of Appeals. And I am quoting.

"The sale was made through a broker and the terms thereof stated in a broker's note, (That is, a memorandum a bought and sold note.) received personally by Plaintiff, [283] and a duplicate copy mailed to Defendant, which he claims was never received."

You see, Defendant in that case raised another contention. He said he never got the broker's memorandum that was——

Mr. O'Connor: Excuse me, counsel. I don't like

to interrupt. What is that case you are citing there?

Mr. Eisner: This case is the case of Thomas Henderson & Company, Inc. vs. Barrow.

Mr. O'Connor: Thank you.

Mr. Eisner: 164 New York Supplement 697. And I am still quoting:

"The learned trial Court at the close of Plaintiff's complaint dismissed the complaint for lack of proof, which rule we conclude constitutes reversible error. There was not alone ample proof to warrant the inference of receipt by Plaintiff and Defendant of the broker's note, which in itself may be a valid contract of sale, (you see, when the broker's note is received, and even though he denied receipt of it) but there was proof also of a ratification thereof by Defendant personally to Plaintiff, an admission of inability on his part to perform the same."

Now then, in this case, if the Court please, we have a broker's memorandum signed by the broker, which is sent and admittedly sent to both parties. Both parties have produced [284] their memorandum. It has been retained by both parties without objection or exception.

Now then, what has the testimony in this case done? You have to connect the correspondence to see what it means when the broker wires the Prince, Keeler Company and says, "What about my broker's memorandum which you confirmed?" And they don't answer, and they say, "Yes, we are trying to make delivery and we are having difficulty with the man with whom we are dealing." Now

then, if the Court please, a seller, or a party to a contract, doesn't make any difference which, whether he is buyer or seller, cannot recognize the existence of the contract, cannot promise delivery. As your Honor said this morning very truly, this price went up. It didn't go up to 43 cents all at once. I mean, it went up at stages from time to time. Remember that immediately after the fire, I mean to show that it wasn't all the fire. Mr. Kaplan was out here immediately after that and the contract is in evidence to show he bought regular apricot kernels at 28 cents at that time. Now then, if the defendant in this case had not promised delivery repeatedly and said, "I am going to make delivery to you," the Plaintiff in this case could have covered; I mean, if he had said, "No, I am not going to make any delivery, I don't recognize a contract at all, the broker exceeded his authority, it wasn't in writing," or I mean "I expected a [285] written formal contract to be executed," then the buyer could have covered, and would have covered at 28 cents when he could. But the seller, instead of doing that, constantly promised delivery, and it is in writing here, up to the time of November 16, 1955. And during that time, the buyer, of course, acted to his detriment, because he was induced by the seller to rely upon his promises.

Now that not only constitutes a ratification, but it constitutes an estoppel, and we quote it in the case here, and if the Court please, in which that is established beyond any question. And it is the case of *Moore vs. Day*, 123 Cal. App. 2nd, a rather re-

cent case, at page 134. Now in that case, if the Court please, there was no written contract, I mean, between the buyer and the seller.

The Court: What are the facts?

Mr. Eisner: The facts are these. The buyer kept promising the seller that he would take delivery, just as the seller in this case kept promising the buyer that he would make delivery. During the time that the buyer was promising the seller that he would take delivery, the price, instead of going up, kept going down, just the opposite to this, you see. So that when the buyer finally refused to take delivery, the price was far lower than it would have been, or than it was immediately following the contract, and during the period that he was promising to take delivery. So the Court said, in ruling, "You can't promise to take delivery [286] and wait until the price goes down when the seller could have sold if you had refused immediately, upon the market, at a price which was *was* not nearly as low as when you refused to take delivery. Consequently, you are estopped from pleading—you are trying to make use of the Statute of Frauds as a sword instead of a shield."

And I just read, it is a short paragraph, if the Court please, I will read it, because it is on all fours. There the shoe was on the other foot, but the shoes fit both feet.

"Applying the well settled principle hereinbefore set forth to the factual situation in the instant case, we believe that the Court's finding that Appellant was estopped from availing himself of the Statute

of Frauds is supported by the evidence and the law. The Court was fully justified in concluding that Appellant had made the offer for the beans and knew that respondents had accepted it; that respondents continued to rely on appellant's renewed assurances that he would complete the transaction from about March 1st to September 10th; that relying on appellant's assurances respondents refrained from selling the beans to others and altered their position to their damage and loss. Under such circumstances the Court had a right to believe that appellant was attempting to use the Statute of Frauds as a sword and not as a shield." [287]

Now then, if the Court please, exactly the same situation as here. A defendant is seller, and this correspondence that I have read, I mean, Counsel can't just explain it away. He does the best that anyone can do. He says that it is a case of trying to avoid a lawsuit. That's the reason that he wrote these letters recognizing a contract. But it goes back far earlier than any attempt to avoid a lawsuit. There wasn't any threat of a lawsuit. Really from just September right along, from the time there was first the attempt to get out of the contract by asking the broker, "Can't you get me out of this contract?" right after the fire, where he said, "My supplier, my packer, my garbage man, is having difficulty in cracking these pits." And so he wants to get out of the contract. Remember, that letter was written on September 21, 1955. And we have letter after letter, if the Court please. "I know that you sold in good faith, I know that the buyer

bought in good faith, and we are going to make delivery, and we are going to make it within—we are trying to straighten this out.” Now then, there isn’t any apology or explanation that can be made of it, and none has been attempted. It just isn’t there.

Now then, the question of law in the case is, can any party to a contract recognize the contract time after time as a binding instrument, or that a contract has been in existence, and then claim, one, that, “I am not bound because [288] my authority was not given in writing,” or two, “I am not bound because a formal written contract afterwards was not executed?” Now that just can’t be done. In the first place, so far as the Court please, as far as the ratification is concerned, and the Court realizes that ratification is exactly the same as prior authority, when a ratification is given, and this ratification—is something else, something amounts to a ratification, if someone acts on my behalf, for example, let us assume that this broker, Prince, Keeler, didn’t have authority, I haven’t gone into the preliminary letters, but they, in themselves show a recognition of the brokers to go ahead in this transaction. But, so the ratification is so clear that I have confined my argument to ratification. Let’s assume that there was no written authorization, and then followed this correspondence, if the Court please, this letter, these letters of recognition of this contract, and they couldn’t be any stronger than they are, I mean, and when I asked Mr. Sternau what contract he was referring to when he asked to get out of it, and

he says, "This contract." And of course this was the only contract. They didn't make any other sale of apricot kernels. That is what they were talking about. And I have cited to the Court here, and Counsel has not even attempted to answer the authorities on ratification.

Let's take the case of *Kelly vs. Clark* here, which is a [289] California case, because they come from California up to the Supreme Court of the United States, which I have quoted from. And all are the same. And I will read this, if the Court doesn't mind:

"The second point is that there is no memorandum signed by defendants or their authorized agents, and that the contract is therefore void by reason of the Statute of Frauds. The record clearly shows a contract entered into between Plaintiffs and Defendants through Davis in San Francisco and the Continental Brokerage Company in Chicago."

There, there were two brokers in this transaction.

"It is the law that a complete contract, binding under the statute of frauds, may be gathered from letters, writings and telegrams between the parties, relating to its subject matter, and so connected with each other that they may be said to constitute one paper relating to the contract. Conceding that the telegrams contain all of the elements of the contract, nevertheless, Defendant contends that the contract yet lacks the greatest essential, to wit, the signature of the parties to be charged, either by the parties themselves or by someone shown to be au-

thorized by them. By their signed telegram of August 5th, quoted above, defendants treated the contract as one made for them by the plaintiff."

Now then, we can't read these letters in this case— [290] not only treated, but they shouted that this is a contract which we are bound by, and that we would like to get out of.

"* * * signed telegrams and letters between the parties incorporated by reference the previous telegrams constituting the contract. Defendants neither denied the contract nor repudiated their acts, the acts in their behalf of the Continental Brokerage Company."

I suggest to the Court, those words, how pertinent they are here! The defendant in this case retains these contracts, they never objected in any manner to what Prince, Keeler had done. "In a letter written by defendant to plaintiff on August 14th, before the goods arrived in Chicago, wherein defendants seek to justify their position of interpreting the contract as one for immediate shipment, they say: 'We are sorry that a misunderstanding has arisen, but a contract is a contract.' "

Now is that any stronger than saying, by the defendant in this case, "I know that you sold in good faith and the defendant bought in good faith, and that we are going to deliver under the contract?"

"It will be thus seen that while there was not an express ratification of the effects of the contract expressed in words, there was an express recognition that there was a contract. The uncontradicted evidence is that the respective parties recognized

the transaction as one under a [291] contract. The difference between them being as to whether the contract calls for prompt shipment or immediate shipment."

Now if the Court please, the parties to this have recognized the contract time after time. So far as the plaintiff is concerned, the record is full of his letters, "When am I going to get delivery? What about our contract?" Referring to it, so far as Prince, Keeler saying, "When are you going to deliver under the contract?" They are referring to the contract. So far as the defendant is concerned, his letter is—one after the other, which I have read to the Court this morning, it is most significant, they indicate time after time there was a recognition of the contract and the promise of delivery. As was said by our Supreme Court in *Ballard vs. Nigh*, "Of course authority must be shown, but it need not be express authority. It may be implied. And one of the recognized legal methods of proving authority is by ratification. From such proofs, the law implies previous authority to the same extent as if in the first instance it had been expressly confirmed. The doctrine of ratification proceeds upon the theory that there was no previous authority and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority and results as effectively to establish the relation of principal and agent as if the agency had been authorized [292] in the beginning."

Now then, that's that case, if the Court please. In other words, if there is a recognition of the existence of the contract, it is a ratification of the contract, and it is exactly the same as if previous written authority were given.

Now I have cited another case, Franklin Sugar Refining vs. Hegerton. In that case a letter written by the Defendant requesting that shipment be not made, I mean, the defendant wrote a letter and said, "Don't make shipment." And the Court held that's a sufficient recognition of the existence of a contract when you ask that shipment be not made. And this is the quotation: "This letter of * * * read in connection with the letter it answered is a full recognition, an acknowledgment, of all the alleged contracts of sale. The number of barrels bought, the base price of 221½ cents, and the time of delivery. And it meets the demands of the statute as fully as if the original memoranda of sale, including those of September and October, had been signed by the defendants. A written recognition of the contract expressed either in one writing or in several, taken together, even with the request for release, refusal to perform the contract, or the denial of its validity, is sufficient under the statute."

Now this case goes so much further than anything of that [293] kind. I mean, here we have promise after promise, recognition after recognition, of this contract, in this case, if the Court please.

In another case, of Franklin Sugar Refining

Company vs. Mullin Company, and this is a Federal case also, I read:

“We are clearly of the opinion that these papers signed by the defendant, recognizing the existence of the contract and requesting changes of it, were a compliance with the statute that some note or memoranda in writing of the contract of sale be signed by the party to be charged. We therefore hold, which holding is in accord with our holding in *Howell vs. Whiteman Schwartz Corporation*, the court below had erred in sustaining the demurrer and its order must be reversed and the cause remanded for further procedure.”

I would like to call one other case to your Honor's attention because it is so clear, and I think it is a paramount point in this case. The two are tied together, in other words. You can't recognize the existence of the contract, you can't promise delivery under it by your contract, and thereafter say, “Well, the agent wasn't authorized to execute the contract.” No more can you say, “Well, although I recognize the contract time and again as in existence, yet it wouldn't have been in existence, it wasn't in existence, because there wasn't any formal contract signed.” Now if it was [294] not the intent that the original memorandum would be the contract, it would never have been recognized, and couldn't have been recognized unless a formal contract was executed. One party to a contract cannot say, “Here I am bound by this contract, I promise you delivery,” and then when the time occurs subsequently, and after, particularly, the buyer, the

other party, has acted in reliance to his detriment, say, "Oh, well, those were simply statements of mine. Nevertheless, it was the intent that all my statements be disregarded, because the contract wasn't to be a contract until a formal contract was executed." You can't blow hot and blow cold, you can't ratify it, you can't recognize it, and then when it goes against you and you want by afterthought to raise every technical defense that ingenuity can bring to bear, say, "Well, that should have been in writing." You can't say, "That should have been a formal contract."

Now I will just read this one case. This is *Hull vs. Whitman Schwartz Corporation*, 7 Fed. 2nd 513:

"Admittedly in this case the defendant in this case did not sign the order itself, constituting the contract of sale. It was signed by Fred D. Townsend Brokerage Company, Brokers."

Now we get right down on all fours.

"If this were all, it might be necessary to show that the Townsend Brokerage Company was the agent of the defendant. This might be done, but it is unnecessary, for defendant [295] wrote and signed two letters referring to the contract."

In other words, here we could get right down and say by correspondence, and so show, that Prince, Keeler & Company was authorized to issue the memorandum of sale, which it did issue, and the conduct shows, we say, that it recognized it. But the Court said it is not necessary to do that in this case because the defendant has written letters in which he referred to the contract.

“On July 27, 1920, it wrote to plaintiff as follows: ‘If possible, cancel this cargo sugar, or if you cannot do this, do not ship until last half August. We are loaded with sugar for some time and cannot take it now. Please return your contract with your reply.’ On August 11, 1920, Defendant again wrote plaintiff saying: ‘Don’t ship any sugar until we advise you. We have more than we can finance.’ ”

That was the case of the buyer.

“While the note or memorandum must be signed by the parties charged,——”

and by the way, counsel, when he says that both parties have to sign, is in error. The Statute of Frauds provides that it must be signed by the party to be charged. That is, the party who was sued.

“While the note or memorandum must be signed by the party charged, the instrument itself need not be signed. The contract may be so referred to in a letter or paper [296] signed by the party to be charged as to incorporate it therein by internal reference. A letter will incorporate the unsigned contract by internal reference and bind the defendant even though he therein disclaims responsibility, if the fact of the consummated agreement appears therein, and its terms are recognized.”

In other words, even if the defendant, I mean, in trying to get out of this, out of a contract, just as the defendant in this case did, on September 28th, said, “Please get us out of this contract,” recognizing it, or if he said, “I can’t deliver, I can’t make these terms, I can’t do it,” I mean “I can’t

make the delivery," just as the buyer in this case said, "I can't take the delivery," it works both ways. "I have too much sugar, don't ship. I can't take it." The words "Please return contract with your reply," refer to the contract of sale in question, which was enclosed in a letter and was the only enclosure in it.

Now in our case, on September 8th, when the broker sent the broker's memorandum, that was enclosed in a letter, and it was the only letter, the only contract that was referred to. And when the testimony was given, there wasn't any other contract to refer to.

"Don't ship," the directions to cancel this car of sugar. "Don't ship any sugar until we advise you." That refers to the sugar embraced in this contract. For Plaintiff did not [297] have any other for delivery of sugar to the defendant. And it says, "These letters are the clear recognition and adoption of the terms of the contract and the acknowledgment by defendant that it was bound thereby." Now that is mere child's play compared with what the defendant did in this case.

And one case from the Supreme Court of the United States, which we quote:

"We agree with the Supreme Court of Colorado that in the face of this evidence produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to the agreement again and again. He declares his intention to adhere to it and to hold the Plaintiff to it."

Now then, if the Court please, here we have these facts pertaining to this transaction—the broker's memorandum, I mean, which is a customary method of doing business. The receipt—no dispute as to the receipt. The retention of it. And the recognition of it, time and again.

Now how are we going to get away from that? I mean, it's the law! And so far as one other case that I would just like to call attention to, a recent California case regarding the necessity for a contract, a formal contract to be executed, it is a question of intention, and the intention of the parties is to be gathered from their conduct. And this case, if the Court please—I don't know whether I [298] have cited this in my brief, I may have done so—is the case of *Gibson vs. De Lasalle Institute*, 66 Cal. App. 2nd, 609. Now in that case, if the Court please, the wires between the parties were to the effect that a contract was to be executed. I mean, they were wires and they had the words to that effect. And when it came before the Court, that contention was urged. Well, there couldn't be a contract, because no formal contract was executed. That was what they said. But that doesn't apply in our case, because it recites in the broker's memorandum that this is to be the final contract. In this case between the parties, both of them, there is to be a formal contract. And regarding that the Court said:

“It is said in 17 *Corpus Juris Secundum*, 391, that whether an informal agreement, which, according to the understanding of the parties, is to be re-

duced to writing, takes effect as a complete contract at once, or only when a formal written contract is executed, depends upon the intention of the parties, as construed from the facts of a particular case. In *Thompson vs. Sherwin*, 65 Cal. App. 2nd, 432, this Court held that where the parties agree upon the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is thereafter to be prepared and signed, does not alter the binding validity of the original contract, [299] and that whether an oral agreement should take effect forthwith as a completed contract depends upon the intention of the parties, and that such intention is to be determined by the surrounding facts and circumstances of each particular case.

Then quoting from another case, the Court says: "The Court held that Defendant's letter was an offer that Plaintiff's reply was an acceptance, and it considered the subsequent conduct of the parties shown by parol evidence as indicating that both parties supposed that a contract existed."

Now then, if the Court please, the facts in this case, I mean, their subsequent conduct and what transpired here, and it is just unavoidable, shows conclusively that there was a recognition of the contract, a promise to perform it, a promise to deliver under it, and that that continued repeatedly until the 16th of November, 1956. Now I don't know what could be more conclusive. There is no conflict in the evidence. If the Court is satisfied on that

point, I will turn to the next point that is raised, and that is, custom, that has been urged here.

Now then, nothing could be clearer than that that there is and has been for years and years a well-established custom of the trade that regular apricot kernels cannot be a lot of broken kernels, but, on the contrary, they may not have more than five per cent broken kernels by weight. Now then, there wouldn't be regular apricot kernels or delivery [300] of regular apricot kernels unless that is true. Now then, sometimes that is expressed in the contract. In the case of California Packing Corporation, they make it a practice to express it. But always it is a part of the contract. Mr. Elfendahl said so, and—what was the name of Calpak's man? Mr. Engell. Mr. Kaplan. They all testified establishing that. And the contracts are in evidence showing that sometimes it is included, sometimes it is not included. And when it comes to whether it is for a delivery under it, with a certificate, they can't get a certificate of regular apricot kernels unless they are in compliance with that.

Now then, when Mr. Kaplan or the plaintiff in this case bought regular apricot kernels, nothing was said about the percentage of broken kernels that was going into the delivery. This might have been, this was the first transaction, let us say, of the sale of regular apricot kernels by the defendant. But that didn't mean that they weren't familiar with the business. It didn't mean that they could go into the trade and sell regular apricot kernels at the price prevailing for regular apricot kernels,

that everyone was buying and selling regular apricot kernels, and assume to indulge in that market, in that business, and then come in afterwards and say, "Well, regular apricot kernels may be understood in the trade as being unbroken to an extent of not more than five per cent, but I didn't know that; therefore, you didn't prove that I [301] knew it, therefore, I am not bound to it, and therefore, the contract isn't a contract, because I didn't know about it."

Now then, if the Court please, when someone goes in, if I go into the market and I sell tomatoes, and if there is a custom of the trade, we will say, that in a delivery of first grade tomatoes, there can't be a greater percentage of rotten tomatoes, we will say, or overripe tomatoes, than a certain number, and if I go in and engage in that trade, I can't thereafter come back to my buyer and say, "Oh, I didn't know about how many rotten tomatoes I could deliver to you." I mean, there is nothing,— "I didn't know about that first class, what was the custom of the trade; therefore, I am not bound by it." That isn't the law, if the Court please, and we quote the California case which is directly in point upon it. I will just read from this case of *Miller vs. Germaine Seed Company*, 193 Cal., page 62, at page 69 and 70. Quoting:

"The rule that a person will be presumed to have contracted with reference to a general custom or usage, whether he knew of that custom or not, has frequently been invoked. In *Steigman vs. Joseph Leigh Company*, 234 Illinois, 84, Northern 640, it

was said: 'A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general custom, usage or custom relating to such business, and this is so whether he knew of the custom or not,' " and giving various authorities. [302]

I also cite the case of *Pasterino vs.*—

The Court: What facts were dealt with, what was the reasoning?

Mr. Eisner: The reasoning, they claimed they didn't know about the custom, and it was held that whether you know about it or not—

The Court: Was there any substantive law in the State of Illinois in relation to that?

Mr. Eisner: This was not, that last quote was not from Illinois, that last quote is from—and this is so whether he knew the custom or not, that's the statement from the Supreme Court of the State of California, citing various authorities.

Then I cite also the case of *Pasterino vs. Reen Brothers*, 90 Cal. App. 2nd, 841, in which the defendant contended that he went into the fisheries, did some business in fish, and he contended that he wasn't bound by the trade custom because that was his first venture in the fish business. The Court said, "Oh no, you can't go into the fish business and plead ignorance of the custom. Why, you can see how absurd it would be, if the Court please, if anyone could assume to go into a—here Mr. Sternau comes to New York with a sample and says, "Here I am going to sell the apricot kernels, you can buy them.

What's my price? Well now, my price will be competitive. I will wait until the opening prices, and my prices will be competitive with the opening prices." [303]

And then he makes a sale of regular apricot kernels and then, can he say that, "Well, regular apricot kernels as understood in the trade (and we interpreted it, of course,) I haven't any answer to that"—is that they shall be of a limited percentage of broken kernels, because broken kernels can only be used for certain purposes. Can he say, "But, my friend, I didn't know about it, and you can't prove it. You can't prove that I knew." Why, it would be just absurd for that to take place.

Then, if the Court please, the facts in this case are so clear that the defendants knew of this custom. In other words, what would be a natural thing to do when he receives the letter of September 8th from Prince, Keeler saying that "Here the buyer says that this is the regular custom of the trade. He said that he didn't mention it before because he assumes that if you had a formal contract, you would include it." Now if a person didn't know about it what would he do? The first thing that he would do, he would go out first to verify the fact, find out whether or not this statement of the buyer was a true statement, and therefore I asked Mr. Sternau when his deposition was taken, and I asked him upon the trial, "When you got that letter, did you make any inquiry to find out whether that was a true statement, that it was the regular custom of

the trade?" "No." Now then, "At any time subsequently did you raise any question about [304] it?" "No." But he recognized this contract after that statement was made, time and again.

And then, if the Court please, I thought it was startling. I didn't expect such an answer. But I asked this defendant upon the stand, I mean, "Have you ever bought regular apricot kernels?" Why, I meant this firm. I don't care what Mr. Sternau individually knew, he isn't the corporation, he isn't the entity. But here is a corporation, the Plaintiff, that for years was in the business of buying regular apricot kernels and manufacturing them into paste. They didn't have to go outside of their own records. They didn't have to go any place at all to ascertain that. They didn't have to ring up California Packing Corporation. They didn't have to ring up Rosenberg Brothers & Company. They didn't have to ring up the California Prune & Apricot Growers Association, to find out whether this was an established custom, and whether or not it was a part of every contract of sale that was made. They knew it, if the Court please. And they never raised any question about it, and there never was any question raised about it until it was raised by the ingenuity of counsel.

Now then, if the Court please, counsel has cited a number of cases. I didn't answer all those cases, and I have this reason for saying so. I received his brief, I didn't see it until Thursday. The case was on the calendar for Monday [305] for argument. I

wanted counsel to have my reply over the week end, so I prepared in one day, and my reply brief was prepared on one day and served upon counsel on Friday preceding the Monday. So there are some—it isn't as detailed as it might have been.

The Court: Well, I will give you another week following that.

Mr. Eisner: Well, I mean, I am presenting it now, because there is no—yes, you did give me another week, that's right, following that. And for oral argument. And I feel that I could cover it in oral argument without a further written memorandum.

Now all that counsel—counsel, I mean, hasn't cited authority to the contrary of this, that where one indulges in a trade where there is a general and a well established custom, that he is not bound by the custom of the trade. Counsel suggests that custom is a matter of interpretation and not adding to a contract. We are not adding to this contract, if the Court please. We allege in our complaint that the meaning of regular apricot kernels—we are interpreting that,—is, according to the well established custom of the trade,—regular apricot kernels means apricot kernels in which there is a tolerance of not exceeding 5 per cent by weight of broken kernels.

Now this same case that I have referred to, this Gibson [306] case, if the Court please, also refers to the custom.

“When there is a known usage of the trade, persons carrying on that trade are deemed to have con-

tracted in reference to the usage unless the contrary appears. (It is up to them, in the instant case, details such as storage, place of delivery, transportation, and the like, mentioned by the trial court, are matters either governed by the usages of the business or subject to proof by parol. Absence from the memorandum of provisions therefor is not fatal to Plaintiff's case.)"

Now, then, if the Court please, this is an instrument of interpretation, because what are regular apricot kernels? We say that regular apricot kernels, according to the custom of the trade—a delivery of apricot kernels—are kernels in which there is this minimum tolerance, or rather, maximum tolerance of broken kernels. So if the Court please, there can be no question but that under this well-established custom, and the unusual part of the thing is that there isn't any—counsel couldn't produce a single witness, just mark that, if the Court please,—we produced, your Honor asked at the beginning how many expert witnesses are you going to use here in this case, and I said, "We will use two." I could have brought a dozen, if the Court please. I could have brought the Dried Fruit Association of California, the secretary. I could have brought any number of them. [307] But I brought two who I thought were outstanding representatives from the California Packing Corporation and Rosenberg Brothers. Now don't you think that if there was one witness—I don't care where—who could have testified that that isn't a regular estab-

lished custom of the trade, and that it isn't a part of the contract, even whether it is expressed or unexpressed, that they would have had witnesses here for that purpose? But they couldn't produce one.

Now, then, they are trying to indicate a discrepancy, relying between Mr. Engell's testimony and that of Mr. Kaplan's and Rosenberg Brothers. I said, well, so far as California Packing Corporation is concerned, the California Packing Corporation expresses it in its contract. Yes, Mr. Engell said, it is their practice to express it. But Mr. Engell also said, and if the Court will read his testimony, that in all instances, in every case of regular apricot kernels, it is also a part of the contract and understood that there is this tolerance respecting broken kernels. He testified too, respecting the practice of the Dried Fruit Association of California, which is almost conclusive in itself, if no delivery of regular apricot kernels will be certified as a delivery unless it is within that tolerance. And he didn't know about the others. He thought that others followed the same practice. That was as far * * * but all he knew was his own. He didn't know about Rosenberg, he didn't know [308] about others. But we have established by Rosenberg Brothers, by Elfen-dahl, we have established by the broker's memorandum from Mayfair Packing Company, from Sewell Brown & Company, from the Prune & Apricot Growers Association, that this is not always expressed. It is implied. But it is always a part of every contract. In other words, this tolerance.

Now then, when Mr. Brown, of Sewell Brown—of Prince, Keeler, Mr. Sullivan—told Mr. Kaplan that Mr. Sternau had sent on this contract, and Mr. Kaplan asked, “Well, I would like to have it included, this provision, have it expressed in it,” that didn’t mean that there was any waiver, I mean, or that usage or custom was done away with. It was expressed in the California Packing Corporation contract. It was expressed—it wasn’t expressed in the Rosenberg contract, but they were buying regular apricot kernels, and that was something that was a well understood product, and they were being charged for regular apricot kernels.

Now then, the Court has said that, well, this wouldn’t have occurred if there hadn’t been a fire. Well, if there hadn’t been a fire, I mean, very probably, first of all, Sunset-Sternau wouldn’t have sent the letter of the 28th and tried to get out of the contract. If there hadn’t been a fire, they would have delivered.

The Court: If the fire hadn’t occurred, you and your associate here would be out of a job. [309]

Mr. Eisner: Well, that’s very true, that is very pathetic. But the fact was that when this fire occurred, the first day following it, practically, the defendant in this case wanted to get out of this contract. Now then what did Mr. Kaplan do? Came out and still they could be purchased, then, for 28 cents a pound, and he purchased apricot kernels for 28 cents a pound after the fire. And then he contracted the defendant in this action, and what did the defendant say? Because the defendant said, “Yes, I

am going to deliver to you, I am having cracking difficulties."

Mr. Kaplan said, "Maybe I can help you."

"I wish you would help me."

"All right, I will see what I can do."

He gets the California Packing Corporation to agree to do the cracking.

Now that isn't only Mr. Kaplan's testimony; your Honor will remember that Mr. Engell upon the stand testified that they were waiting to hear from Mr. Sternau, but they never let them hear from him. He was only going to deliver—he was arbitrary here—if Bonzi delivered to him. And the mere fact that Bonzi did not deliver to him, I mean, is not an excuse, and I quote from the authorities there, and I don't know as your Honor needs authorities upon that point, that the mere fact that someone who makes a sale depends upon somebody else to make delivery to him, as the source of supply, is [310] not any defense. As a matter of fact, it is something that should be stricken and disregarded. I think, I hope I have covered all of the points and the elements of estoppel, if the Court please. I think I have covered that too.

The Court: We will take a recess now.

(Recess.)

Mr. O'Connor: Your Honor, I must say that I think that the points that he has made, Plaintiff has made the most of. However, there are certain points which have to be answered, and which have not been answered either by counsel or by the cases he has cited.

Now so far as the Defendant's position in this case is concerned, there has been no controversy, there has been no answer to the authorities that I cited in my brief to the effect that where the parties to an action in negotiations contemplate the signing of a formal agreement, that there is no contract until the formal agreement is signed. I have cited, as I referred to this morning, the case of *Spinney vs. Downey*, at 108 Cal. 666, which has been cited time and time again, and I have cited numerous cases that follow the rule of *Spinney vs. Downey*, where the Court held, in that case, that when it is part of the understanding between the parties to a contract that the terms of the contract are to be reduced in writing, and signed by both parties, the assent to its terms must be evidenced by the signature of both parties or [311] it does not become a binding obligation upon either. Especially where the proposed contract contains reciprocal stipulations and covenants upon the part of each party as a consideration of the acts of the other.

I respectfully submit, may it please the Court, that prior to September 1st and on September 8th, when Prince, Keeler wrote to the defendant in this case returning their formal contract, that both parties at that time contemplated that there should be a writing between them. On the one hand, the Plaintiff wanted the sales memo changed to include the 5 per cent clause.

Mr. Eisner: Just a moment, counsel. Not the sales memo. There is no mention of that. Much as

I—excuse me for interrupting, because I won't have an opportunity to reply.

Mr. O'Connor: Yes. Well, I am referring, counsel, to exhibit, I think it is, 10. I think we all understand each other. It is the Prince, Keeler note. I referred to it repeatedly as a note. This is dated September 1st. Mr. Kaplan on September 8th contemplated that that note would be amended to include the 5 per cent clause.

Mr. Eisner: Counsel, there is nothing in the evidence on that, and it is contrary to the facts. Excuse me for saying so.

Mr. O'Connor: Well, I think you are wrong, and I rather resent the statement, counsel. [312]

Mr. Eisner: I know I am not.

Mr. O'Connor: Just a moment. The evidence will be the best answer to that, if the Court please. I will read the confirmation of my statement, and I don't try to make misstatements.

Mr. Eisner: What exhibit are you reading?

Mr. O'Connor: Exhibit 10. This is a letter of September 8th, may it please this Court: It reads as follows:

"Mr. Kaplan of American Almond Products, Inc. phoned today to advise that two 100-pound bags of apricot kernels were received and found satisfactory with one exception: The broken kernels far exceeded the normal tolerance."

And went on to say, "We advised him that we were mailing your formal contracts No. 2023 (which is Exhibit No. 9 in evidence), received today. How-

ever, during the discussion, he advised that he had overlooked the following standard clause: 'Merchandise not to exceed 5 per cent by weight of broken kernels,' and requested that we add this on our contract and returns your for the same addition."

That certainly, if the Court please, is a contemplation by the parties that there will be a formal contract in line with the Spinney case.

Now reading on, "He advised that all his regular suppliers, Calpak and Rosenberg, insert this clause which is a recognized condition of sale for this particular item [313] (not custom). It was not brought up before because he assumed it would be included as a matter of course in your contract. We are therefore returning your contract 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request." That happens to be in evidence, if this Court pleases, as corroborative of the fact that the plaintiff himself, contemplated a written contract; as corroborative of the fact that the defendant contemplated a written contract, we have exhibit 9, or rather, exhibit C,—it is in on both—which is the formal contract. Excuse me. Now, it is Exhibit 9, your Honor. That referred to still another contract. Exhibit 9, which was the formal contract 2023, referred to in Plaintiff's exhibit No. 10. The contract of the defendant, which the defendant in the normal course of business upon the receipt of a sales memo, which we described, the exhibit No. 9,

the one prepared by Prince, Keeler in which the Plaintiff is relying upon as a formal contract,—

The Court: I didn't follow that clearly. Exhibit 8—what is it?

Mr. O'Connor: Exhibit 8, your Honor, is the bought and sold note which is alleged and pleaded to be the written contract in this case, and to which is to be added by trade and custom, which they pleaded, the 5 per cent clause. [314]

The Court: Read it, read it.

Mr. O'Connor: Now this is the bought and sold note. It is on the stationery of Prince, Keeler & Company. It is sold to American Almond Products Company for account of Sunset-Sternau, and shipment and so forth, of the regular apricot kernels, 175 tons, 100-pounds bags, containing the arbitration clause and other clauses which we have previously discussed, your Honor. But this is the sales memo that is referred to in Exhibit No. 10. When Prince, Keeler says, "We are therefore returning your contract No. 2023 (which is exhibit No. 9) and will appreciate your authorizing the addition of the above clause in compliance with buyer's request."

Now obviously the plaintiff in this case contemplated a written contract by his instructions to Prince, Keeler on September 8th. Obviously also, from the testimony of Mr. Sternau, from the fact of previous dealings between these very parties themselves, a formal contract in writing was contemplated and none was ever entered into, because the defendant found out it could not comply with that

condition. It was the first time such a condition, or as has been termed here, a trade custom, had been referred to. They knew of it?

Now, if that is so, then the case of Spinney vs. Downey, cited in defendants' brief, followed by a number of cases upholding the doctrine of that case, are controlling. Those cases have not been answered. The holdings in those cases [315] and their application to the present case have not been answered by the plaintiff in this case, for the very good reason, I think, that because of the evidence put in in this case by them themselves, the writings of the parties, the broker, there is no question of doubt but that a written, formal contract was contemplated, regardless of whose fault it was that it wasn't entered into, and regardless of any writings.

It was never done.

Now, your Honor asked the question about the authority of the broker, what authority does a food broker have. I think I can answer that. Of course in this case I think the plaintiff has to take the position that Prince, Keeler, the food broker, was the agent of the defendant for the purpose of binding the defendant Prince, Keeler. Such is not the fact so far as food brokers are concerned; strangely enough, may it please the Court, there aren't too many cases on food brokers. We get the usual run of cases, real estate brokers and their authority must be in writing and so forth, under the statutes, the specific statutes in the State of California.

But there are very few cases on food brokers. We

have in California the case of *Ryan versus Walker*, which I have cited, at 35 Cal. App. 116, where a food broker has been defined to be a middleman whose business is to bring seller and buyer together.

And then quoting from 12 Cal. Jur. Supplement, page 10—or *Corpus Juris*, pardon me—at *Corpus Juris Secundum*, Page 10, [316] Section 6, we find the following language:

“Except to the extent that he acts as agent for either party, a broker, strictly speaking, is a mere middleman or negotiator to bring the parties together to form their own contract. Except to the extent that a broker may be employed to act as the agent of one of the parties, as explained past in Section 14, he is, strictly speaking, a middleman or intermediate negotiator between the parties, and his duty is merely to bring the principals together to negotiate with each other for the purpose of making a contract or to find and produce a purchaser or seller, able, ready and willing to accept his client’s terms, or to effect a transaction with his client upon any terms satisfactory to both; or if so authorized, to make the contract for them.”

I respectfully point out that in this case there was not one iota of evidence that Prince, Keeler were ever authorized to bind the defendant *Sunset-Sternau*. To the contrary, the statement in Plaintiff’s Exhibit 10, “Will appreciate your authorizing the addition of the above clause,” indicates a limitation of their authority.

Exhibit No. 26, which is dated October 26, 1955, likewise, if the Court please, states in the words of Prince, Keeler [317] that they are limited, their authority is limited and they can't bind the defendant.

Now added to that is the fact that they never purported to bind the defendant at any time in this case.

Question: What is their authority? Did they have it in writing?

The answer is, no, there isn't one iota of evidence; the evidence is to the contrary. There isn't an iota of evidence that Prince, Keeler ever had the authority to bind the defendants. And that lack, if the Court please, is a fatal defect in the plaintiff's case.

And I read from a case—I must beg the indulgence of the Court, because while we look for authorities to substantiate our position, we can look and look and we don't find them all at one time. I did find this one, very frankly, last evening, when it was too late to read it, and I did so this morning.

We have a case, which I think is on all fours. Particularly where, as here, the defense of the statute of frauds was pleaded, we think we have a case here, Georgia Peanut Company versus Fabel Products Company, reported at 96 Federal Reporter 2nd Series, Page 440, decided by this Circuit Court.

The Court: What is the date?

Mr. O'Connor: The date of this, if the Court please, is April 29, 1938. [318]

The Court: '38. Who wrote the opinion?

Mr. O'Connor: The opinion in this case was written by Denman, concurred in by all other judges: Denman, Matthews and Healey.

The Court: That is our Circuit here.

Mr. O'Connor: Yes, this Circuit, your Honor.

The Court: Very well.

Mr. O'Connor: In this case, and I——

The Court: What is the factual situation, first?

Mr. O'Connor: The facts of this case were as follows, your Honor:

The two parties to the action, through a broker, arrived at, there was a memorandum of sale of peanuts signed by the broker, the same as in this case, and the plaintiff who brought the action for damages claimed that the broker acted as representative of both parties and that the broker's memorandum was binding upon both.

The Court rejected it; it was tried in Los Angeles before Judge Yankwich. The defense was that there was no meeting of minds and there was no meeting of minds on the contract and that the alleged broker was in fact merely the agent of the appellant seller and hence its signature was not that of an agent of the buyer.

The statute of frauds was invoked in this case, the same sections identically as are invoked by the defendant in this [319] case, including Section 2039.

The Court stated:

"It is not necessary to resolve this dispute, since we regard it as controlling that the price of the

peanuts was \$18,450 and that there was no written authorization from the buyer to the broker. The buyer is the one sought to be charged. For the purposes of this decision we are accepting appellant's contention that the claimed broker was in fact the agent of both parties in signing the memorandum of sale, that is, only for the purpose of discussion, and that had it been properly authorized, the contract would have been valid. California Civil Code 1624, subdivision 4, as amended, provides what contracts must be in writing."

That is the ones we pleaded here, the identical language, Code Section also of 2039, which we are relying upon in this case.

Now it says here:

"The appellant contends that there is an exception in the California law of a brokerage transaction from the provision of Section of Civil Code 2309 and that a broker occupies a status in which his authority to act as such may be proved by parol."

And Section 2309 reads: [320]

"An oral authorization is sufficient for any purpose except that an authority to enter into a contract required by law to be in writing, can only be given by an instrument in writing."

The Court says:

"No California cases cited show such an exception, but what is clearly the plain provision of the Code section, that the authority of any agent, including brokers, to execute an instrument, required to be in writing, shall likewise be created in a written instrument."

It goes on to state, to distinguish certain other cases which didn't have these statutes, and where no statute was referred to.

Then it says further:

"In our opinion the provisions of the California Code sections are subject to but one interpretation, that is, that everyone exercising an authority to sell or buy, save the specially excluded auctioneer, which is the exclusion in California, whether a broker or any other class of agent, must have written authority to enter into a contract required to be made by him."

Now they characterized then a broker in the same fashion that the Ryan case classified him, as a mere middleman, a [321] negotiator to bring the parties together, and I think the evidence is conclusive here that Prince, Keeler was doing exactly the same thing.

If they weren't would Prince, Keeler have returned the contract that the defendant sent them, or would they have just inscribed across there the five per cent clause? Would they have asked for authorization to include the five per cent clause in the so-called memorandum of sale agreement, which is Plaintiff's Exhibit No. 8 in this case, the so-called bought and sold note?

Mr. Eisner: They didn't ask that, counsel. They didn't ask that.

The Court: What's that?

Mr. Eisner: They didn't ask authority to include it in that broker's memorandum. I mean, they

asked authority to include it in the 2023, which was the contract, the formal contract that Sunset-Sternau were sent.

Well, I am sorry to interrupt.

Mr. O'Connor: That's all right. I will resolve it, if there is a question as to any statement of mine, counsel. I had it here just a moment ago, your Honor.

The Court: What is it you wish?

Mr. O'Connor: Plaintiff's Exhibit No. 10. I had it here just a moment ago. Maybe I have got it over here.

I just had it here and I misplaced it among all these [322] papers. I just finished reading from it.

The Court: Well watch counsel on the other side.

Mr. O'Connor: Oh, I have it here. It went under the heap.

Now, in this letter of September, Plaintiff's Exhibit 10, which counsel questions my statement on, Sullivan of Prince, Keeler and Company says that the following standard clause, "Merchandise not to exceed five per cent by weight of broken kernels," had been requested to be inserted in the formal contract, and then he goes on to say——

Mr. Eisner: Formal contract is the 2023.

Mr. O'Connor: That's correct.

Mr. Eisner: No, the memo.

Mr. O'Connor: "And requested that we add this on our contract, and return yours for the same addition." That's what it says.

Mr. Eisner: I mean that's——

Mr. O'Connor: "Now we are therefore returning your contract 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request."

Now, they are enclosing the contract 2023 for the addition, Kaplan has asked that there be added to this note the five per cent clause, and they are asking for authorization.

I think it is rather plain from the letter. [323] I don't think, maybe I interpreted it wrong, but I certainly think it is there, and I think it is there in very plain language.

Now the latter case which I cited I think to be controlling. In other words, this Circuit Court has found there is nothing mysterious or strange about 2309, the Civil Code of the State of California. It says that all these contracts required to be in writing, the authority must be in writing. There isn't any authority in this case to Prince, Keeler to enter into any contracts.

Now if that be so, there has never been a written authority given by the defendant Prince, Keeler. And if that be so, then, question: Where is the contract of September 8th relied upon by counsel? Is it a complete contract? They have the authority, they could have put the clause in. They didn't. They asked for authority to do so. They returned the contract.

Now we come up to some of the cases cited, and I would like to review for your Honor the cases cited by counsel.

He cited the case of Thomas Henderson Company versus Barron, 163 New York Supp. 697, as authority that a note such as this, in New York, a bought and sold note, such as Plaintiff's Exhibit No. 8, is sufficient. It must be borne in mind, and counsel will admit, that New York State does not have the same, or did not at that time have the same statute of frauds that we did, so therefore that question wasn't at issue.

But the Court in that case—— [324]

The Court: Pardon me. What was the difference?

Mr. O'Connor: The difference in that case is that they had no statute of frauds in New York State.

The Court: At all?

Mr. O'Connor: No.

Mr. Eisner: No statute of frauds?

Mr. O'Connor: Not so far as that case is concerned.

Mr. Eisner: Oh, come, counsel.

Mr. O'Connor: Here's what happened in that case.

The Court: I don't follow that theory. Develop that.

Mr. O'Connor: In the Henderson case, decided in, I think, 1917, the turning point, my notes show that there was no statute of frauds in existence there, as there is in California. I don't think I am wrong. You can take me up on that later, counsel, if you don't mind.

In that case, though, to get the facts of the case,

the appellate court ordered a new trial and the new trial was ordered on the basis that certain evidence was excluded which would have attempted to show the broker's authority to bind the defendant.

The trial court had excluded that evidence and it held for the defendants.

The appellate court said that that evidence should not have been excluded because—and it went on particular to say that where the broker mailed out a broker's note in [325] connection with this sale, that it constituted a valid contract of sale—that is, so far as New York State is concerned.

There was no judgment on the merits in that case.

It differs here. We are deciding this case on the merits. There isn't any appellate question as such on procedure or upon evidence.

Now counsel has cited the case of Moore versus Day, a California case, in which there was the situation factually far different from the present case. In that case the Court found that Gilligan, a broker, was in fact the agent of the appellant, that he was in fact the agent; that the broker for many years had purchased——

Mr. Eisner: You have your cases mixed there. Moore versus Day is the case of estoppel. In that case you must be referring to something else.

Mr. O'Connor: Well, it comes under the term of ratification. I have gone on, I have allowed the other points to go, counsel.

Mr. Eisner: Well, I mean you just have the

wrong case. That is, Moore versus Day is another kind.

Mr. O'Connor: Moore versus Day, 123 Cal. App., counsel?

Mr. Eisner: Yes, it is 123 Cal. App. But that was the case of estoppel.

Mr. O'Connor: I am taking them in the order that you cited them, counsel. This was on ratification and estoppel.

Mr. Eisner: Well, ratification is one thing.

Mr. O'Connor: It is on both and my notes show that you referred to them in both phases of it.

In that case the Court found that one Gilligan was a broker, and was in fact the agent of the appellant. The actual evidence was, they found from the evidence that he was an agent, and that for many years he had purchased beans for the appellant on a commission basis, the custom being for the appellant to advise the broker how much he would pay for a certain quantity of beans, and if the terms were satisfactory, Gilligan would obtain the written contract for sale and purchase.

Respondents were fully familiar with the practice of executing a written contract covering transactions entered into with a broker through his agents. The Court also found in this case that the buyer said he would accept the beans.

They also found that the terms of the contract were complete and both parties in accord, and both parties capable of completing the contracts.

That is not true in the instant case, because on

September the 8th, there was a condition: "I will accept" say the plaintiff, "if you put that five per cent clause in and deliver accordingly."

The defendant upon receiving that information finds out [327] that it can't confirm and doesn't give the authority to amend the contract to send it back, either to send back its formal contract, or to allow the broker to insert it as part of the document, our Exhibit 8 here, the bought and sold note.

Now we have another case cited on ratification, Franklin versus Edgerton.

Now in that case, that is 288 Fed. 698, the terms of the contract were complete in the writings as to price, quality and delivery, which was the last, I guess, to the seller. In other words, the date of delivery was left somewhat up to the discretion of the seller. The Court held that the defendant's contention that the contract was uncertain as to price and quality was not true, that the letters between the parties, interpreted in the language of the particular trade, definitely fixed the price and quality, and that defendant fully understood the trade terms used.

Now in that case they used symbols—sugar was known by certain symbols, and the price and quality and so forth. And it found that both parties had long been in the business, and that the defendant, who sought to be charged in that case, well knew what the trade terms were, and interpreting the written terms of the contract, there wasn't any question of any additional clauses by trade usage

and custom, or trade usage and custom, being used to interpret the terms actually used between the people. [328]

It differs from the present case in that trade custom is sought to be attached, an attached clause or condition of a contract at a particular time.

Now the case of Franklin versus Mullin was cited, and this is an interesting case. The Court again invoked the parol evidence rule to use trade custom and usage to interpret the meaning of the words of the contracts.

Again the same firm was involved, Franklin. But trade custom and usage was not used to add a term or condition to the contract. The Court, and I quote from that case, said:

“In the present case we are not writing into the contract something that is not in it, but we are finding the meaning of the terms used in the contract, which presumably were placed there by the parties because they meant something, and to each of them we are bound to give force and effect under the familiar rules of construction.”

They weren't attempting to add anything. In this case there is an attempt to add by trade custom and usage a clause as of September 8.

In the case of Howell versus Whitman Schwartz, cited by counsel, we have essentially the same situation that existed in the two previous cases. All the terms of the contract were agreed upon in the exchange of letters between the parties, although no formal contract was signed. [329]

That's not true here; there is an essential part of that contract, the terms of the defendant's contract and the inclusion of the five per cent clause. There was never any agreement reached on it.

In the case of Beckwith versus Talbot, cited by counsel, 95 U.S. 289, which is a rather old case, all of the terms of the contract again were referred to specifically in the letters between the parties. There was an entire agreement upon it, and the Court enforced the contract.

Now so far as custom and usage is concerned, if the Court pleases, those are cases cited by way of ratification by counsel, but they do enunciate for the most part the doctrine of the use of trade custom and usage as a means of interpretation, not as a means of adding to contracts.

Now counsel has cited two cases under trade custom and usage which he says apply to the present case. One is Miller versus Germaine Seed Company. Now that case involved the purchase of seed by the plaintiff by the defendant. The seed turned out to be different from the specific type requested. The plaintiff sued for damages for breach of warranty. Now it was proved in that case that both parties had long been in the business, were fully familiar with the terms of the business and the warranties, and ordinarily in that type of thing, a Civil Code section in the State of California applies, applying a condition of warranty, the purpose for [330] which it is purchased.

In this case, custom was proved among the trade, that that warranty provided by the Civil Code of

California was not part of the contract between the purchasers and sellers of seed, because they couldn't warrant. For some reason within the trade, and reasons best known to themselves—technical reasons.

The Court held that the trial court should have given an instruction to the jury, in the light of evidence produced by the defendant, to the effect that in the sale of seed, there is a general and universal custom and usage of the trade that seed is not sold on warranty.

That's the decision on appeal in that case. And the Court did say just prior to the quotation of the plaintiff, that the plaintiff put in, that:

"To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements, that is, custom not inconsistent with the contract, and of such general and universal application that a person is conclusively bound by it.

- (1) It must be actively or constructively known;
- (2) It must be consistent with the contract."

Now in this case, may it please the Court, the evidence and the undisputed evidence, the admissions of the plaintiff himself, Mr. Kaplan,—I am saying the plaintiff in that [331] sense—show that the defendants were new in this business. The attempts to bring them in through their making paste some ten or twelve years ago is rather a fallacy, because, as Mr. Sternau testified, he was merely a salesman, he had no charge or part of the business. His brother, who died in 1947, conducted that business, and his father before him. A Mr. H. S. Rich-

ards, following his brother's death, conducted the business. That man has since retired. He had conducted the business and Mr. Sternau was merely the salesman for the company.

Now the Court said in this case that that must be known, and it wasn't known to Sternau, to the defendant in this case, until it was called to their attention by the letter of September 8th, and that was the first time it was known. And then we have the very interesting situation developing where the plaintiff himself insisted, not in reliance upon the trade custom, but insisted that it be made a part of the written contract, the contract that was to be written and formalized between them.

Now, citing from the case of Robertson versus Dodson, 54 Cal. App. 2d 661, the Court said that a person is not bound by a custom or usage unless he had actual knowledge thereof, and it is so general or well known in the community as to give rise to the presumption of such knowledge. And then in the same case: [332]

"Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract."

And I have cited that case in my brief.

In the Security Bank versus Southern Bank, 74 Cal. App. 734, the Court said at Page 749:

"A custom or usage which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform, and either known to those sought to be charged thereby or so generally known or notorious that

knowledge and adoption thereof must be presumed." That is not the case here. There was no intimation at any time up until September 8th that there was such a custom. But the custom was, or the condition, was called to the attention of Prince, Keeler by the plaintiff himself. No reliance upon it. "This we want as a condition to this contract. This we are not relying, on September 8th we are not relying upon a custom, we want it in writing."

And the testimony of Mr. Engell to the same effect, that it is customary, if the Court please, to put it into contracts. Or in the absence of it being in specifically, as in that language, to obtain a certificate which guarantees that the kernels do not exceed five per cent by weight.

The buyer can rely upon that particular certificate [333] either way. That's the way sales are consummated. That is the custom. The custom is not the unwritten custom of adding a clause to a contract so that the plaintiff can say on September 8th, "Here, we have a contract," because on September 8th the plaintiff said, "We don't have a contract. I want this in." And no authority was ever given to anyone to include it, either in the sales memo, nor did the plaintiff thereafter at any time either request the brokers in this case, Prince, Keeler to return the memo with the clause in it, or to obtain from the defendant their formal contract 2023 with the clause in it. They let it ride.

Now there is one case that was cited by counsel, and that was the Pasterini case, where a custom was alleged to be binding upon a person. In that

case, the question involved the interpretation of contract terms through usage and custom, not the addition of a clause or condition, not the attempt to add terms to a contract.

Also in that case, familiarity with the custom and usage through long previous study of the particular industry, in that case the fishing industry, was proved by the party seeking to charge the defendant.

The defendant had made a study of the fishing industry, the evidence showed, for at least six months before entering into it. And when it used the ordinary trade terms, the Court said ignorance of those trade terms could not be predicated [334] upon that evidence, because it was shown he had made a thorough study of the fishing industry before he ever went into it. The same situation is not present in the instant case, where it is a single deal made by a company engaged in other transactions.

This was the first and the only single transaction of its kind that they attempted to make.

Now we cite by way of proving that the custom insofar as pleaded and attempted to be proved is binding upon the defendant in this case, as adding a condition to the contract to make it a whole contract, that that is not binding, the case of *Sharp versus Keating*, 13 Cal. App. 2d 637, wherein the Court said:

“However, we think the law is that parties, as to a subject matter concerning which known usages prevail, by implication incorporate them into their agreements if nothing is said to the contrary.”

And I respectfully point out in this case that something was said to the contrary; that the plaintiff would not rely upon a custom, if such there be. He wanted it in the contract and he demanded that it be in there in writing. And we have Mr. Engell, his own witness, testifying as an expert, that it was customary to put them in.

I repeat, of course, that we never put in, because the defendant took the only normal course—he tried to find [335] out whether he could comply with that.

This is his first deal. And when he gets a letter saying that the sample is fine except that the tolerance far exceeds the normal tolerance of five per cent, then he has to stop and think, and he finds out from the supplier, “No, I can’t furnish you any better kernels than I have already furnished you.”

They were shelled by Continental Nut, a recognized firm in the industry. And they turned out to be far, far over the five per cent. The fact of the letters referring to a contract, by a lay person, merely an attempt in this case to complete a sale if a sale can be completed, and the terms finalized between them. But nowhere, at no time, is there a specific agreement upon the five per cent clause, nor on the part of the plaintiff has there ever been a deviation from its request that the five per cent clause be included in writing in the contract. Never. There was never any waiver of it at any time.

For these reasons, if the Court please, and for the reasons cited in the briefs in connection with the *Spinney versus Downey*, and those authorities,

I consider, number one, that never at any time has there been a contract which was binding. That it was the intention of the parties and of the evidence, the evidence of plaintiff clearly shows, and the evidence of the defendant likewise shows, that a formal [336] contract, if there was to be a formal contract, reduced to writing, — that was never done. That custom cannot be used in this case to add a condition to a writing already in existence which in itself was a contract. That the statute of frauds is available to the defendant, and that there isn't any estoppel in this case.

Until September 20th, or whatever date the fire was,—and there was some doubt as to the exact date—if there wasn't a fire, there never would have been this action, as your Honor has rightly said. And yet prior to that time and between the 8th and the 20th or 21st, the plaintiff in this case never sought of the defendant the changes, nor did it seek of Prince, Keeler the changes in these sales memos.

It wasn't concerned. because, up to that time, the plaintiff knew it was negotiating. When it served its purpose, to try and use someone else to take over its loss, then they come in with the trade custom and say, "This is our contract," when they knew, through previous dealings with the defendant and knew in this case that the defendant wanted a formal contract in writing at all times.

I will submit it, your Honor.

Mr. Eisner: I will just be about five minutes, if the Court please.

The Court: I won't be here five minutes. I don't get [337] paid for overtime here.

Mr. Eisner: Well, I will look into that.

The Court: Just a moment.

The older I get, the more patient I have got.

Mr. Eisner: I think so. I think you always have been patient.

The Court: I think you have done pretty well today. I want to select the cases that he has cited and be prepared tomorrow morning at 10:00 o'clock, and I will both sides half an hour each.

Mr. Eisner: Well, if the Court please, I was due to go to New York yesterday, or rather today. I postponed it, and I am flying to New York tomorrow. I won't be able to do it tomorrow, if the Court please.

The Court: Very well.

Mr. Eisner: I have a matter there and——

The Court: If you want to conclude, I will do the best I can with your case.

Mr. Eisner: All right.

The Court: Now.

Mr. Eisner: I will just be about five minutes.

The Court: Very well.

Mr. Eisner: Counsel has referred, if the Court please, to the case of Georgia Peanut Company versus Fabel Products Company, 96 Fed 2d, in which your Honor asked who decided the [338] case and Judge Denman and the court, and it is the case with which I am fully familiar.

Now if the Court please, that was a case in which the Court decided that although—I mean generally

in other jurisdictions, the broker's memorandum is sufficient, in the State of California there must be written authority to the broker to execute the written memorandum.

And I stated to your Honor from the beginning that that is the law in the State of California.

But in that case, in the Georgia Peanut case, if the Court please, there was no recognition, there was no ratification, and the point in this case, and the point which counsel ignores and which cannot be ignored, is the fact that there was this repeated ratification and recognition of this contract, which is in all respects equivalent to written authority in the beginning, and one is exactly the same as the other.

I am fully in accord with the Georgia Peanut case. In other words, if there were no ratification here, if there were no recognition of the contract, then it would be comparable.

But here in this case, where there is recognition and ratification, it is exactly the same as written authorization, where there is written ratification, and it is in exact compliance with that.

So we are in exact accord with that case, and we are arguing basically upon that same principle. But counsel [339] ignores the fact entirely that there can be a written ratification of the contract.

He has ignored entirely in his argument to your Honor the repeated recognition of the fact of the existence of the contract, the repeated promises of delivery under the contract; not one word has been said about that, if the Court please.

All of which distinguishes this case, and all of which brings it directly within the principle of written authorization, because there is written ratification.

Now then, counsel says we are adding a term to this contract, and therefore it is different from usage and custom. But we are not adding a term to this contract. The allegations of the pleadings are that the term "regular apricot kernels," according to a general and well established custom and usage existing among those engaged in the California apricot kernel trade, means, and meant at the time said contract was entered into, that broken kernels in any delivery shall not exceed five per cent by weight.

In other words, we are defining, in other words, just exactly as it would be if it were a symbol, when these regular apricot kernels or regular apricot kernels — what that means, that it means just exactly that.

It isn't adding a term to the contract, it is defining a term of the contract, what "regular apricot kernels" are. [340]

And that is exactly what we proved. Now the authorities that counsel has cited on the question of usage and custom, when read, are found to be just exactly in accord with what we say. He hasn't emphasized them just the same, but every one of them says where there is a general usage and custom of the trade and it is well established, they are presumed to have knowledge of it.

Now then, what more definite proof could there

be of a general and well established custom of the trade than what we have proved here in this case? Uniform custom of the trade. And according to his own authorities they are chargeable with knowledge of it and they can't plead ignorance of it.

And as I said to your Honor, when one goes into a business in which the definition of a certain article is—in which a certain article is defined, he can't plead ignorance of it when he presumes to indulge in that trade, and sell an article and engage in that trade—when he does that, he is presumed to know what are the generally recognized customs of that trade, particularly when it is a custom that defines the article and what it is.

As I said before, it would be absurd to say that anyone could sell regular apricot kernels and could charge the price of regular apricot kernels and then say, "I am not going to deliver what are generally understood in the trade as regular apricot kernels because I didn't know what regular apricot [341] kernels were."

If the Court please, something is said about a certificate. What was said about a certificate is that where a certificate is called for, I mean when these brokers' memoranda were issued, there is no certificate that accompanies them. Such broker's memorandum constitutes the contract. But very frequently, and particularly in a case of export shipment, they request a certificate from the Dried Fruit Association of California.

As a matter of fact, that is stated in one of the

letters, the letter of September 8th from Prince, Keeler and Company to the defendants.

And when a certificate is called for of quality, then the certificate will only be issued by the Dried Fruit Association when this custom is complied with.

In other words, it is such a well recognized custom of the trade that it doesn't make any difference whether it is in the contract or not in the contract, when the Dried Fruit Association of California is asked to certify to a delivery of regular apricot kernels. They don't ask, "Is it in the contract? Is it not in the contract?" But they say that if it is a regular delivery of regular apricot kernels, it must comply with this and not a more than this percentage otherwise they cannot certify to it.

In other words, if the Court please, there is nothing [342] in these authorities of defendant which is contrary to the facts; I mean in the case and the authorities generally.

And so far as authorities are concerned upon a contract having to be reduced to writing, if it is the intention of the parties, of course that is an elementary proposition of law, that where there is the intention of the parties that a contract shall be reduced to writing and that it shan't be effective until it is reduced to writing, then it has to be reduced to writing.

But that's a question of intent, and that intent is to be determined from the conduct of the parties and here in this instance the broker's memorandum which is retained by the parties recites in its very

terms that it is the contract unless a formal contract is executed and then the parties do not execute a formal contract, and time after time, months after that, and after they held that formal contract in their own files, knowing it, they recognized the contract time after time, and promised delivery.

Now there cannot be any question but that that is a recognition, and by their own conduct they show that it was not the intention that there should be, or of necessity, such a contract.

And if the Court please, I think that I have covered the points. I think if your Honor will look at this correspondence, look at the recognition under this contract, that there isn't any answer to the proposition, and counsel [343] certainly hasn't answered it, that there is a recognized contract that has been deliberately breached.

And there is just one other closing statement that I want to make.

Counsel has referred to Exhibit 16. I haven't referred to it as yet. But in this Exhibit 16, it is a letter from Prince, Keeler and Company to Sunset-Sternau, in which Prince, Keeler and Company expresses its disgust with the conduct of Sunset-Sternau in connection with this very transaction, and I will read it to you:

"Confirming, as we have, we do not have the double talk, double work, double talk and reconfirming as we have had on shelled and unshelled almonds and walnuts the past two seasons and on apricot kernels this season."

In this letter, Sunset-Sternau was trying to get

out of another contract that it made, and the broker says to Sunset-Sternau in this case, "The way for you to get out of this one is to send the buyer a sample of old crop, and if you send the buyer in this instance a sample of old crop, he will reject it and maybe you will be off the hook."

Mr. O'Connor: Just a moment, counsel.

Mr. Eisner: I will read it here; it is in evidence.

Mr. O'Connor: I will object to this, if the Court pleases. I think the intent is rather obvious on the part of counsel, to [344] prejudice the court against——

The Court: A jury is absent.

Mr. O'Connor: The jury is absent; we can speak very frankly. Here we have a firm of brokers in New York, who had very good reason to eliminate the arbitration clause in New York. And, for example in this case, as the correspondence will indicate, they were not authorized to use the arbitration clause, because we dealt with New York people.

We have some New York brokers here, where there is a constant dispute. They want to sell at any price, find the firm out here so they can make a commission. You are bound to have disputes.

And as to who is right or wrong, they have their own words here. This happens to be incidental. The part that has reference to this case is a very small part of this letter.

Mr. Eisner: Well, I certainly can refer to it. You read the letter.

Mr. O'Connor: That's right, I have read the portions that are applicable to this case, counsel.

Mr. Eisner: You think you have, counsel. I am going to read the portion that I think is, also.

Mr. O'Connor: Well, go ahead. It's merely an attempt to use outside, or evidence of some other dispute between the broker in this case and my client on another deal, where the full facts aren't before this court. [345]

The Court: Who introduced it?

Mr. O'Connor: Pardon?

The Court: Who introduced it?

Mr. O'Connor: The plaintiff introduced, and it was introduced solely for the purpose of allowing those portions which refer to this instant in evidence. The rest was excluded.

Mr. Eisner: Oh, that's not true, and——

Mr. O'Connor: Oh, certainly it is true, counsel.

Mr. Eisner: Just a moment, now.

Mr. O'Connor: You know better——

Mr. Eisner: Just a moment. I am just concluding now my argument.

The Court: We have got along nicely up to this point.

Mr. Eisner: Yes.

The Court: Read that.

Mr. Eisner: This is, if the Court please, where Sunset-Sternau entered into a contract with another concern for sale of walnuts, black walnuts, and wanted to get out of that contract. So the broker says to him:

“Just send the buyer a sample of old crop black walnuts and you will be off the hook.”

The Court: What relation has that to the issues in this case?

Mr. Eisner: It has only the relation to this case, if [346] the Court please, showing the attitude between the broker and his, what he thinks of the defendant in this case.

The Court: That's rather remote. I can't get the reasoning there.

Mr. Eisner: Well, it isn't——

The Court: What's that?

Mr. Eisner: It is simply showing, if the Court please, the thought of the broker, of the attitude of this defendant, and when he says, "We have not had the double work,"——

The Court: Maybe that broker was hard to get along with.

Mr. Eisner: "Double work, double talk and re-confirming as we have had on shelled and unshelled almonds and walnuts the past two seasons, and the apricot kernels this year." That's what they said. Now, if the Court please, I wouldn't have mentioned this, I hadn't mentioned it, until counsel mentioned this letter which I have referred to. And I think if the Court will——

The Court: Your five minutes are up.

Mr. Eisner: Very well, I will submit the matter.

The Court: Now, do I understand you are going away in the morning?

Mr. Eisner: Yes, your Honor.

The Court: How soon do you expect to be back?

Mr. Eisner: I hope to be back the end of the week?

The Court: What's that? [347]

Mr. Eisner: By Friday or Saturday.

The Court: Both you gentlemen are exhausted?
No more?

Mr. Eisner: Just about.

The Court: No more assistance for the Court at all?

Mr. Eisner: I think that we have rendered all the assistance that this Court needs. Some Courts may need more assistance, but I don't think this Court does.

The Court: Well, I want to say to you gentlemen that you have both come well prepared. You have got a wonderful record here and if you didn't do anything else, both of you fitted yourself to be able to put up a good argument in the Circuit Court if you reach there. Is that clear to you, Mr. O'Connor?

Mr. O'Connor: Yes, it is, your Honor.

The Court: So that if I happen to make a mistake here, at least with a little cost, you can go across the hall. That's the only comfort I can give you. And either one of you are bound to prevail here, so somebody has got to be disappointed.

Now, I will do the very best I can with it. Have it submitted tomorrow morning on the calendar for decision, if that is agreeable.

Mr. O'Connor: Yes, it is, your Honor.

The Court: Did you enter that in the order, sir?

The Clerk: Yes, your Honor, tomorrow morning for submission. [438]

The Court: And I shall go over carefully what

has been said and done here, and I don't know of a better way to get a that than to get a transcript of what has happened here today in this argument. It will help me.

Mr. Eisner: Would your Honor like a complete transcript? How about a complete one?

The Court: I will take a transcript.

Mr. Eisner: How about a complete transcript of the evidence?

The Court: What's that?

Mr. Eisner: How about a complete transcript of the evidence? Would your Honor find that helpful?

The Court: Well——

Mr. Eisner: Suppose we have that made, as well as the arguments.

Mr. O'Connor: Perfectly agreeable, your Honor.

The Court: Very well. Let's see.

(Discussion between Court, counsel, clerk and reporter regarding time necessary for the preparation of the transcript.)

The Court: In that event, get it out as soon as you can. In any event, we will have it stand submitted here.

Mr. Eisner: Yes, your Honor.

Mr. O'Connor: Yes, your Honor.

The Court: Or maybe it had better go over on the calendar [349] so if he gets stuck on the transcript——

Whatever you wish.

Mr. O'Connor: Might be well for the convenience of all concerned, say, by the time of the transcript, your Honor, in the case——

The Court: I want to dispose of it as soon as we can.

Mr. Eisner: It is not a long transcript, because part of it, if the Court please, a large part of the record consisted in reading the depositions. That wouldn't be transcribed, because your Honor has that.

The Court: Very well.

Mr. Eisner: It is only the oral testimony, and that isn't long. So I think that can be done very promptly.

Mr. O'Connor: I think it was all.

The Court: What day will it go over on the calendar to? I would like to hold on to these cases so that I don't get behind. The administrative office comes up and gives us a scolding on the cases. You are aware of that, aren't you?

Mr. O'Connor: I was aware of that at one time, too, your Honor.

(Conversation among Court and counsel off the record.)

The Court: Suppose I put it over two weeks.

Mr. Eisner: Yes, put it over two weeks for submission?

The Court: What date is that?

The Clerk: April 8th. [350]

Mr. Eisner: And then it will stand submitted.

The Court: April 8th for submission. What day is that?

The Clerk: Monday.

The Court: Monday, April 8th, for submission.

You know, I don't know how near you come to a settlement in this case, but unless you settle it of course that will be—my decision will without doubt go to the Circuit Court, because it should.

Mr. Eisner: I don't know.

The Court: Now, if you can dispose of this without—although you said emphatically that there was no possibility of a settlement.

Mr. Eisner: Counsel has never suggested any settlements.

Mr. O'Connor: I don't think there has been a suggestion on either side.

The Court: He indicated in no uncertain way at the outset of this case that there was no opportunity for settlement, on pre-trial.

Mr. O'Connor: On a pre-trial basis, yes, I think I did that.

Mr. Eisner: Well, of course, I am willing to stand ready to discuss the matter with counsel if he wants to.

Mr. O'Connor: When counsel returns from New York, he might—when you get back from New York, counsel, and you will be going tomorrow?

Mr. Eisner: Yes.

Mr. O'Connor: Might discuss it.

The Court: Now, is there anything else?

Mr. Eisner: I think no, your Honor.

The Court: Any way I can serve you gentlemen?

Mr. Eisner: I think you have been very patient. You have stayed here and it is a wonderful opportunity——

The Court: I encourage these things. This case is well prepared and I have a definite state of mine on it right now—subject to change.

I will go over this transcript if it becomes necessary and I think it is worthy of that, because this is a peculiar case, but I will say to you, Mr. O'Connor, if you have an opportunity to make a settlement of this case, I will have no hesitancy in saying to you, you had better avail yourself of the opportunity. That is as far as I will go.

I say that kindly.

Mr. Eisner: Thank you, your Honor, and I will be glad to talk to him.

The Court: I promised myself repeatedly I wouldn't engage in preaching, but I can't seem to refrain from it. Now the only thing I can assure both sides in this case is a proper record and help in any way I can in the event that you want to go forward.

Mr. Eisner: Fine. Thank you, your Honor.

[Endorsed]: Filed April 12, 1957. [352]

[Endorsed]: No. 15690. United States Court of Appeals for the Ninth Circuit. Sunset-Sternau Food Co., a corporation, Appellant, vs. American Almond Products Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 26, 1957.

Docketed: August 29, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

